In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 420

CHARLES McDANIEL, ET AL., PETITIONERS

v.

JOSEPH BARRESI, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted to express the government's interest in this case, to state our view of the arguments supporting the petition for a writ of certiorari, and to suggest that the petition should be granted and that the decision below should be summarily reversed.

INTEREST OF THE UNITED STATES

Under various provisions of the Civil Rights Act of 1964, the United States has important responsibilities for enforcing the Fourteenth Amendment's guaranty of equal educational opportunity. Because this litigation involves an interpretation of those provisions, as well as a construction of this Court's school

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desegregation decisions, its disposition will affect the government's ability, particularly in the State of Georgia, to enforce that guaranty effectively.

STATEMENT

The school desegregation plan involved in this litigation was devised by the Clarke County Board of Education and approved by the United States Department of Health, Education, and Welfare.[1] The plan is concerned only with the Clarke County elementary schools. For the most part, the plan employs geographic zones drawn to promote desegregation; but the board determined that zoning alone was insufficient to meet what it deemed to be a desirable racial distribution of students,[2] and, accordingly, the board

[1] The Clarke County Board of Education is a recipient of federal financial assistance. The application for and receipt of that aid, along with the acceptance of those conditions which federal law requires all recipients to accept, creates a "binding contract." *United States* v. *Lovett*, No. ED-68-C-30 (E.D. Ark., August 28, 1968); *United States* v. *Sumter County School District No. 2*, 232 F. Supp. 945, 950 (E.D. S.C.); *United States* v. *County School Board, Prince George County*, 221 F. Supp. 93, 99 (E.D. Va.); *Lemon* v. *Bossier Parish School Board*, 240 F. Supp. 709, 713 (W.D. La.), affirmed, 370 F.2d 847 (C.A. 5), certiorari denied, 388 U.S. 911. Cf. *United States* v. *Frazer*, 297 F. Supp. 319 (M.D. Ala.). The pertinent terms and conditions of the school district's contractual obligations are defined by Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and by the rules and regulations promulgated by the Secretary of HEW, with the express approval of the President, published at 45 C.F.R. Part 80. The desegregation plan in issue was submitted to HEW in order to satisfy those conditions and thereby remain eligible for federal aid.

[2] The school board decided to seek to achieve a 20 to 40 percent black enrollment in each school, although the board regarded that formula simply as a guideline and the plan calls for two schools with about 50 percent black enrollment.

assigned certain racially identifiable "pockets" across racial lines.[3] The Clarke County school system operated under that plan during the 1969–1970 academic year.

The present suit to enjoin the operation of the plan was brought by parents of children attending schools in the district. The trial court denied the injunction (Pet. App. 23–29), and, on appeal, the Supreme Court of Georgia reversed (Pet. App. 16–22).

The Georgia Supreme Court ordered further operation of the plan permanently enjoined on the grounds that it "neither squares with the Fourteenth Amendment nor its interpretation by the United States Supreme Court holding that 'racial discrimination' is unconstitutional" (Pet. App. 20), and that it violates Sections 401(b) and 407(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000c(b) and 2000c–6(a) (Pet. App. 21).

REASONS FOR GRANTING THE WRIT

We believe the Georgia Supreme Court erred on both grounds and that, if its decision is allowed to stand, efforts to complete the desegregation of the Georgia public schools may be greatly hindered.

1. While the Georgia Supreme Court's opinion does not openly dispute the proposition that school systems

[3] Where the distance between the student's residence and his school is more than 1½ miles, free transportation is provided. Transportation expenses under the plan in issue would be $11,070 less than the school district spent on transportation during the 1968–69 school year under dual operation (R. 225).

formerly segregated de jure must take affirmative steps to overcome the consequences of their own discrimination, *Green* v. *County School Board,* 391 U.S. 430, 438, n. 4, its decision renders that mandate illusory by insisting that the school board refrain from considering race in the formulation of its student assignment policies. In short, the court invoked the simplistic theory that the Constitution is "color blind" for all purposes and that it precludes benign as well as invidious uses of race by the State.[4]

This view of the Constitution has been uniformly rejected by the federal courts, which have recognized that "[a]t this point, and perhaps for a long time, true nondiscrimination may be attained, paradoxically, only by taking color into consideration." *Youngblood* v. *Board of Instruction of Bay County Florida,* No. 29369 (C.A. 5, July 24, 1970). In *Jefferson I* the Court of Appeals for the Fifth Circuit elucidated this concept as follows:

> The Constitution is both color blind and color conscious. * * * [T]he Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose. * * *
>
> Here race is relevant, because the governmental purpose is to offer Negroes equal edu-

[4] The court explained the theory as follows (Pet. App. 20):

> Nor can it be argued that "effective inclusion" because of race is different from "effective exclusion" because of race. Within the proscription of the Fourteenth Amendment, we see no difference. One is just as discriminatory as the other.

> cational opportunities. The means to that end, such as disestablishing segregation among students, distributing the better teachers, equitably, equalizing facilities, selecting appropriate locations for schools, and avoiding resegregation must necessarily be based on race.

United States v. *Jefferson County Board of Education,* 372 F.2d 836, 876–877 (C.A. 5), affirmed on rehearing, 380 F.2d 385 (C.A. 5) (en banc), certiorari denied *sub nom. Caddo Parish School Board* v. *United States,* 389 U.S. 840. See, also, *Board of Public Instruction of Duval County* v. *Braxton,* 402 F.2d 900 (C.A. 5); *United States* v. *Board of Public Instruction of Polk County,* 395 F.2d 66 (C.A. 5); *Wanner* v. *County School Board of Arlington County,* 357 F. 2d 452 (C.A. 4); *Dowell* v. *School Board of Oklahoma City,* 244 F. Supp. 971 (W.D. Okla.), affirmed, 375 F.2d 158 (C.A. 10), certiorari denied, 387 U.S. 931. This concept lies at the heart of this Court's holding in *Green* v. *County School Board, supra,* that a school board's constitutional obligation is not discharged by simply ceasing to require racial segregation: In *Brown II* "[s]chool boards * * * then operating state-compelled dual systems were * * * clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S. at 437–438. Indeed, this Court's approval of the faculty-desegregation formula of *United States* v. *Montgomery County Board of Education,* 395 U.S. 225, was necessarily based on the premise that race would be taken into account

in implementing the remedy. See, also, *Louisiana* v. *United States,* 380 U.S. 145, 154; *Green* v. *County School Board, supra,* at 438, n. 4; *Carter* v. *Jury Commission,* 396 U.S. 320, 340.

2. Equally unsound is the Georgia Supreme Court's notion that the school board's plan violates Sections 401(b) and 407(a) of the Civil Rights Act of 1964.[5] Those provisions, applying only to federal courts and officials, do not purport to be prohibitions but are simply disclaimers of granting new power to federal authorities to deal with purely adventitious, de facto segregation. Thus, they have no effect whatever on the powers of a school board. See, *e.g., United States* v. *Jefferson County Board of Education, supra,* 372 F. 2d at 878–886; *United States* v. *School District 151,* 286 F. Supp. 786 (N.D. Ill.), affirmed, 404 F. 2d 1125 (C.A. 7); *Spangler* v. *Pasadena City Board of Education,* 311 F. Supp. 501 (C.D. Cal.); *Keyes* v. *School District Number One, Denver, Colo.,* 303 F. Supp. 289 (D. Col.); *Swann* v. *Charlotte-Mecklenburg Board of Education,* No. 14,517 at 20–21 (C.A. 4, May 26, 1970). See, also, 110 Cong. Rec. 1518, 1598, 12714, 13820 (1964).

3. Finally, this case does not involve the issue whether the plan adopted by the school board is required by minimum constitutional requirements. For it is clear that a school board has full discretion to go beyond minimum constitutional mandates in achieving desegregation. See, *e.g., Offermann* v. *Nitkowski,* 378

[5] The pertinent portions of each Section are set forth at pages 7–8 of the petition.

F.2d 22 (C.A. 2); cf. *Taylor* v. *Cohen*, 405 F.2d 277, 282 (C.A. 4). To hold otherwise "would be to discourage voluntary action by enlightened public officials attempting to correct one of the underlying causes of racial tension in this Nation." *Norwalk Core* v. *Norwalk Board of Education*, 298 F. Supp. 213, 226 (D. Conn.), affirmed, 423 F.2d 121 (C.A .2).

The essence of this Court's mandate in school desegregation cases has been that school officials must act affirmatively to overcome the effects of racial dualism in education. Because the holding of the court below would obliterate that mandate, its decision is clearly inconsistent with the decisions of this Court and other federal courts on questions of federal law and is, therefore, erroneous. In these circumstances, it would be appropriate for this Court to grant the petition and summarily reverse the judgment below.

CONCLUSION

For the foregoing reasons, we respectfully suggest that the petition for a writ of certiorari should be granted and that the judgment below should be summarily reversed.

Respectfully submitted.

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AUGUST 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970

Supreme Court, U.S.
FILED
SEP 16 1970
E. ROBERT SEAVER, CLERK

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BRIEF OF PETITIONERS

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BRIEF OF PETITIONERS

Petitioners are the Superintendent of Education and members of the Board of Education of Clarke County, Georgia; and, with certain predecessors in office, were defendants in two actions filed in the Superior Court of Clarke County, Georgia, the Plaintiffs, who included the Respondents herein, seeking to have enjoined the use of an elementary school attendance plan adopted by Clarke County Board of Education; wherein injunctions were denied, but on appeal to the Supreme Court of Georgia the judgment of the Trial Court was reversed.

OPINIONS BELOW

Petitioners applied for Writ of Certiorari to review the opinion and judgment of the Supreme Court of Georgia in the case of **Joseph Barresi, Jr., et al. v. Browne, President of Clarke County Board of Education, et al.**, 226 Ga. 456, ... S. E. 2d ...; (A-228-234), which judgment reversed the judgment of the Superior Court of Clarke County, Georgia (A-32-36), which judgment is unreported.

JURISDICTION

Petitioners' application for Writ of Certiorari was filed July 20, 1970, seeking a review and reversal of an opinion and judgment rendered by the Supreme Court of Georgia on June 15, 1970 (A-228-234); jurisdiction of the Supreme Court of the United States being invoked under Title 28, U. S. Code, Section 1257 (3). The Supreme Court of Georgia is the highest Court of the State of Georgia in which a decision could be had; and the case involves the claimed rights and privileges of the parties under the Fourteenth Amendment of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Constitution of the United States, Amendment XIV, Section I:

> "... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The Civil Rights Act of 1964 (Pub. Laws 88-352, Title IV, Section 401; 78 Stat. 246, 42 USCA (Chapter 21) Section 2000c) which provides in pertinent part:

"As used in this sub-chapter . . . (b) 'desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

3. The Civil Rights Act of 1964 (Pub. Laws 88-352, Title IV, Section 407; 78 Stat. 428, 42 USCA (Chapter 21) Section 2000c-6 (a) (2)) which provides in pertinent part:

". . . nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

QUESTIONS PRESENTED

1. Whether the Supreme Court of Georgia was correct in holding that a plan adopted by Clarke County Board of Education for attendance of students in the elementary schools of Clarke County School District constituted a violation of the constitutional rights, under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, of those students who were thereby required to attend schools more distant from their residences than other schools in the school district. The plan in question was adopted in July of 1969, and approved by the Civil Rights Division of the Department of Health, Education and Welfare on August 7, 1969, and established school attendance zones in such a manner as to accomplish substantial integration of white and black students in all such schools, with a ratio of 20% to 40% black and 80% to 60% white students in each school used

as a criterion; and which plan included five areas described as "pockets" or "satellite zones", from which areas students were assigned to schools more distant from their residences than other elementary schools of their grade level in the system; which plan involved the busing of students in some zones to schools more distant from their residences than other elementary schools in the system.

2. Whether the Supreme Court of Georgia was correct in holding that the provisions of the Civil Rights Act of 1964 (Pub. Laws 88-352, Title IV, Section 401 and 407, 78 Stat. 246 and 248, 42 USCA, Chapter 21) prohibited a board of education from adopting and operating a school attendance plan which involved the assignment of students to public schools in order to overcome racial imbalance, and the transportation of students from one school zone to another in order to achieve a racial balance.

STATEMENT OF FACTS

Beginning in 1963, Clarke County Board of Education began integration of its schools, first by means of transfer applications, and subsequently by use of "freedom of choice" and zoning, all without the compulsion of any court proceeding or order. In the 1968-69 school year it operated on a zone basis for outlying areas, and freedom of choice for schools in the central areas of the City of Athens. This was with approval of the Department of Health, Education and Welfare (HEW) (A-160).

In October 1968, HEW notified the Board of Education that a plan would be required for future years which would involve greater desegregation of students and faculty. A committee of three members of the Board, as well as faculty, administrative staff members, citizens groups, and the School Desegregation Education Center of the University of Georgia, studied various zoning, pairing and other plans; and the Board of Education finally, on

April 24, 1969, approved a "Neighborhood Plan" as being the best that could be devised, in view of the complicated racial distribution and housing patterns and transportation problems in Clarke County. This plan had the tentative approval of the Atlanta office of HEW, but after submitting it to the Washington, D. C., Civil Rights Division of HEW, and after considerable discussion and delay by that office, the plan was rejected by letter of June 30, 1969, primarily because the plan left some schools with a small minority of white students and would tend to result in resegregation (A-161-164).

After considering the possibility of submitting a different plan, the Board of Education, on July 16, 1969, voted to proceed with a hearing before a hearing director on the question of legality of the Neighborhood Plan previously submitted. However, on July 30, 1969, after several meetings, the Board adopted what was called a "Compromise Zoning Plan", which was submitted to and approved by the Washington office of HEW on August 7, 1969. This is the plan which is involved in this litigation (A-165).

This plan is basically a neighborhood zone plan, but involves four "Pockets" to be bussed from one zone to schools in another, and one "pocket" from which students were within one and one-half miles of two schools, and were assigned to the one of those two schools further from their home (A-174).

In order to have space in the schools to which students were sent from these pockets, it was necessary to adjust zone lines for those schools in such a manner that some students would be transported to schools other than those nearer their residences. The primary purpose of this plan was to achieve some degree of racial balance, and the members of the Board of Education, when asked by the committee appointed to devise a plan, what racial composition should be considered, suggested a criterion of 20% to 40% black in each school (A-182, 204).

Two actions were filed in Clarke Superior Court to enjoin the operation of this plan, the plaintiff's being groups of white parents of children residing in zones whereby they were transported to schools more distant from their residences than other schools; and also three black citizens who resided in the "Pocket" from which their children walked to a school in an adjoining zone, while there was another school nearer their residences. None of those persons in the four "Pockets" required to be transported by bus were parties to either of these actions. (A-48).

The petitions in these actions contended, among other things, that the plan violated the Fourteenth Amendment rights plaintiffs to equal protection of the laws, and violated the provisions of Title IV of the Civil Rights Act of 1964 (A-8 and 22).

These actions, together with a third action by plaintiffs against the Georgia State Board of Education (not material here), were consolidated for trial, and after hearing the Trial Judge denied the injunction sought by plaintiffs (A-32-36).

Some of the plaintiffs in those actions appealed to the Supreme Court of Georgia, which Court, on June 15, 1970, reversed the judgment of the Trial Judge, and ruled that the plan adopted by Clarke County Board of Education was unconstitutional in that it deprived plaintiffs-Appellants of equal protection of laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States; and that it was in violation of Title IV of the Civil Rights Act of 1964, in that it assigned students to particular schools solely on account of their race (A-228-234).

This plan, while designated at the time of its adoption as a plan for the 1969-70 school year, must continue as the basic plan for future years, with some modifications, and,

if desegregation is to continue, must still retain the "Pocket Bussing" and zoning in the manner declared unconstitutional by the Supreme Court of Georgia, unless that decision is upheld. Whether the decision of the Supreme Court of Georgia is correct or not is the question which the Supreme Court of the United States is asked to determine.

SUMMARY OF ARGUMENT

1. Boards of Education of public schools have the judicially declared "affirmative duty to take whatever action may be necessary to desegregate their schools so that they are no longer identifiable as white schools or Negro schools."

2. In the placement of students in schools a board of education is vested with a wide discretion.

3. Neither a child nor his or her parents has any constitutional right to choose which school the child shall attend; nor is assignment to a more distant or less convenient school than another school in the system a violation of the person's constitutional rights under the Fourteenth Amendment.

4. While the establishment of a unitary school system requires that students be assigned without regard to their race, it is necessary that race be taken into consideration in order to eliminate a formerly operated dual school system.

5. The Civil Rights Act of 1964 (Pub. Laws 88-352, Title IV, Section 401; 78 Stat. 246; 42 USCA, Section 2000c, and Title IV, Section 407, 78 Stat. 248, 42 USCA, Section 2000c 6(a)) does not prohibit voluntary action by a board of education which involves busing from one area to another in order to accomplish school desegregation.

ARGUMENT

1. Boards of Education of Public Schools Have the Judicially Declared Affirmative Duty to Take Whatever Action May Be Necessary to Desegregate Their Schools.

The opinion and judgment of the Supreme Court of Georgia (A-228-234), which the petitioners herein insist should be reversed and set aside, holds that the school attendance plan adopted by Clarke County Board of Education violates the rights of the Plaintiffs in the Trial Court, who are parents of children attending elementary schools in Clarke County, Georgia, under the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States. The opinion of the Supreme Court of Georgia states that ". . . in our view, the United States Supreme Court has not declared that compulsory integration of the races in public school systems is demanded." The opinion cites **Green v. School Board of New Kent County**, 391 U. S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716, as its authority for this conclusion.

We do not understand **Green** to authorize the conclusion reached by the Supreme Court of Georgia. In fact, **Green** very plainly states (pp. 437-8) that school boards under **Brown II** are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." **Green** further states (p. 439) that "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now." Also (p. 442), that "The Board must be required to . . . fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'negro' school, but just schools."

The issue in **Green** was whether or not a "freedom of choice" plan adopted by the school board of New Kent County, Virginia, was a sufficient compliance with law, and this Court held that it was not. To the same effect were the decisions of this Court in **Raney, et al. v. Board of Education**, 391 U. S. 443, 88 S. Ct. 1697, 20 L. Ed. 2d 727; and in **Monroe, et al. v. Board of Commissioners**, 391 U. S. 450, 88 S. Ct. 1700, 20 L. Ed. 2d 733. Monroe dealt with what was called a "free transfer" plan, and the Court held (p. 449) that ". . . if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system, it must be held unacceptable."

In **Alexander v. Holmes County Board of Education**, 396 U. S. 19, 90 S. Ct. 29, 24 L. Ed. 2d 19, this Court states that "Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools."

If there is any doubt that this Court has declared that compulsory integration of the races in public school systems is demanded, the cases of **Green** and **Alexander**, as followed and applied in **Carter v. West Feliciana School Board**, 396 U. S. 290, 90 S. Ct. 608, 24 L. Ed. 2d 477, and **Northcross v. Board of Education of Memphis**, 397 U. S. 232, 90 S. Ct. 891, 25 L. Ed. 2d 246, should make it abundantly clear that boards of education are required to not merely refrain from assigning students to racially segregated schools, but to institute assignment policies whereby all schools will contain substantially integrated students and faculty.

The Courts of Appeals, and particularly of the Fifth Circuit, have very clearly held that determination of school zones which result in continuing segregation because some schools remain substantially white while others re-

main substantially all black do not meet the constitutional requirements, and school boards have been required to alter zone lines or adopt other attendance plans whereby mixing of the races in all schools will be accomplished. **Davis v. Board of Commissioners of Mobile County, et al.**, 393 F. 2d 690 (5th Cir.); **United States v. Indianola Municipal Separate School District**, 410 F. 2d 626 (5th Cir.); **Henry v. Clarksdale Municipal Separate School District, et al.**, 409 F. 2d 682 (5th Cir.).

2. **In the Placement of Students in Schools a Board of Education Is Vested With a Wide Discretion.**

"A school board may exercise discretionary power to assign pupils to the several schools within its jurisdiction, and, where orders and rules made pertaining thereto are reasonable, necessary, and such as will best afford all eligible an opportunity to receive the benefits of proper instruction, they will be sustained by the courts." 79 C. J. S. 368, Section 450.

Respondents' children were not assigned to a particular school on account of their race, but because they resided in an area zoned for that school. Regardless of the race of the individual, all students in the area were assigned to the designated school, but, of necessity, racial composition of the area was a prime consideration.

But, even if it be assumed that the Supreme Court of Georgia was correct in its conclusion that the children of Respondents were excluded from attending a particular school on account of their race, this would still not constitute a violation of their rights under the Fourteenth Amendment under the circumstances and conditions existing. In the exercise of its discretion, and in order to accomplish required desegregation of its schools, Clarke County Board of Education had to make adjustments and relocations of students.

In **Olson v. Board of Education of U. Free School District No. 12**, 250 F. Sup. 1000, on page 1010, the Court stated: "While classifications based on race alone are 'constitutionally suspect' under the Equal Protection Clause, such a classification is not proscribed if it is necessary to the accomplishment of a permissible State policy. The Commissioner has determined that classification is necessary to effectuate the State's policy of equal educational opportunities and he has the support of expert opinion and the New York Court of Appeals. Under the circumstances this Court is not justified in interfering with that conclusion."

The Supreme Court of Georgia has consistently recognized, at least prior to the opinion herein concerned, that boards of education have a wide discretion in the matter of assigning students to schools within their district. **Keever v. Board of Education of Gwinnett County**, 188 Ga. 299 (3 S. E. 2d 886); **Beddingfield v. Parkerson**, 212 Ga. 654 (94 S. E. 2d 714); **McKenzie v. Walter**, 210 Ga. 189 (2) (78 S. E. 2d 486).

3. **A Person Does Not Have Any Constitutional Right to Choose Which School a Child Shall Attend; Nor Is Assignment to a More Distant or Less Convenient School Than Another in the System a Violation of Constitutional Rights Under the Fourteenth Amendment.**

Clarke County Board of Education has consistently tried to meet its obligations with regard to desegregation in such a manner as to avoid being subjected to Court orders on the one hand and local disorders on the other (A-160-176). In April of 1969, after much consideration of various plans, it adopted and submitted to the Department of Health, Education and Welfare what was called the "Neighborhood Plan" (A-167-168). While this plan had its faults in that it left four of the thirteen elementary

schools substantially all white and two predominantly black, no rearrangement of zone lines could be found to alleviate these conditions, without overcrowding some schools and leaving vacant spaces in others.

When that plan was rejected by HEW on June 30, 1969, the Board could find no workable alternative except the establishment of "Pockets" or "Satellite Zones" from which students would be transported to schools in other areas of the county. Since school facilities in such other areas were filled to capacity, it was necessary to adjust zone lines to relieve overcrowding and make room for those brought in (A-174-6). The Respondents, who are some of the Plaintiffs in the Trial Court, and the Appellants in the Supreme Court of Georgia, are parents of white students who consider themselves displaced by such adjustment of zone lines, and three parents of black students residing in the "pocket" from which students attend a formerly all white school although they reside somewhat nearer a formerly all black school. None of the Respondents or other Plaintiffs in the Trial Court are parents of students being bused from any of the "pockets" or "Satellite Zones" (A-48).

The opinion of the Supreme Court of Georgia holds that "The evidence here shows that Appellants' children are 'effectively excluded' from attending a school because of their race"; and that "This neither squares with the Fourteenth Amendment nor its interpretation by the United States Supreme Court holding that 'racial discrimination' is unconstitutional."

That ruling can only be upheld if it is found that a student has a constitutional right to attend a particular school or the school nearest his residence. We submit that no such right exists.

In **United States v. Jefferson County Board of Education**, 372 F. 2d 836, **aff'd en banc.** 380 F. 2d 285, cert. de-

nied sub nom., **Caddo Parish School Board v. United States**, 389 U. S. 840, 88 S. Ct. 67, 19 L. Ed. 2d 103, the Court of Appeals of the Fifth Circuit stated that "A school child has no inalienable right to choose his school" (380 F. 2d at page 390). This was followed in **Davis v. Board of School Commissioners of Mobile County, et al.**, 393 F. 2d 690 (Note 5 on page 693), the Court adding there that "The school board on the other hand, has a constitutional duty to desegregate its system." In **Griffin v. School Board of Prince Edward County**, 377 U. S. 218, 84 S. Ct. 1226, 12 L. Ed. 2d 256, this Court held that "The Equal Protection Clause of the Fourteenth Amendment relates to equality between persons in a state, not between areas." And that "Showing that different persons are treated differently is not enough, without more, to show a denial of equal protection; it is the circumstances of each case which govern."

In **Kotch v. River Port Pilot Commissioner**, 330 U. S. 552, 67 S. Ct. 910, 91 L. Ed. 1093, the Court stated (page 556) that "A law which affects the activities of some groups differently from the way in which it affects the activities of other groups is not necessarily banned by the Fourteenth Amendment (cit.). Otherwise, effective regulation in the public interest could not be provided, however essential that regulation might be."

In **Acree v. County Board of Education of Richmond County, Georgia**, 294 F. Supp. 1034 (S. D. Ga.), the court recognized the principle that no student has a constitutional right to attend a school of his own choice. The body of the opinion cites as authority for this statement the case of **United States v. Jefferson County Board of Education**, 372 F. 2d 236 (supra).

When it became necessary, in order for Clarke County Board of Education to comply with the mandates of this Court, in light of numerous decisions of Courts of Appeals

which made it obvious that thorough mixing of the races is required, and not merely permitting a few members of one race to attend schools where the other race was predominant, or drawing zone lines so that a small number of one race would attend schools predominantly occupied by the other, Clarke County Board of Education found itself confronted with a racial distribution problem in the county which defied solution. The Board adopted a "Neighborhood Plan" (A-167-170), which, although zone lines were considerably distorted in order to afford more mixing of the races, still left two schools with more than 95% white and less than 5% black, two schools with more than 90% white and less than 10% black, one school with more than 80% black and less than 20% white, and one school with more than 60% black and less than 40% white (A-167).

While this plan involved no racial discrimination, it was by no means without faults. That plan was rejected by HEW primarily because it was felt that shifting of persons who considered themselves adversely affected would result in resegregation (A-223-226).

The only course left for the Board to follow required some form of extensive busing of students of one race into schools predominantly occupied by the other. Since the latter schools were filled to capacity, adjustments in zone lines had to be, and were, made. The Respondents herein are some of those who were affected by the zone changes, and who, the Supreme Court of Georgia says, have been denied equal protection of the laws in violation of their rights under the Fourteenth Amendment.

4. While the Establishment of a Unitary School System Requires That Students Be Assigned Without Regard to Their Race, It Is Necessary That Race Be Taken Into Consideration in Order to Eliminate a Formerly Operated Dual School System.

In the opinion of the Supreme Court of Georgia it is stated that "The Clarke County Board of Education has attempted to achieve a predetermined racial balance in its elementary schools by treating students differently because of their race." It is true that when a committee, appointed to make adjustments in the elementary school attendance plan, requested some guide line as to racial composition, the Board authorized a criterion of 20-40% black in each school (A. 181-2, 204).

In order for a board of education to comply with the requirements of this Court in **Brown II**, "to effectuate a transition to a racially nondiscriminatory school system", and the requirement in **Green** charging school boards "with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch", the consideration of the racial composition of the school population is absolutely necessary.

In **Wanner v. County School Board of Arlington County, Virginia**, 357 F. 2d 452 (4th Cir.) it is stated (page 454) that "When school authorities, recognizing the historic fact that existing conditions are based on a design to segregate the races, act to undo these illegal conditions—especially conditions that have been judicially condemned—their effort is not to be frustrated on the ground that race is not a permissible consideration. This is not the 'consideration of race' which the Constitution discountenances."

In **United States v. Jefferson County Board of Education**, 373 F. 2d 836 (5th Cir.), on page 876, the Court states: "The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose." On page 877 it is stated that "School officials have to know the racial composition of their school populations and the racial distribution within the school district. The courts and HEW cannot measure good faith or progress without taking race into account."

5. **The Civil Rights Act of 1964 Does Not Prohibit Voluntary Action by a Board of Education Which Involves the Moving, by Bus or Otherwise, of Students From One Area to Another in Order to Accomplish School Desegregation.**

The opinion of the Supreme Court of Georgia, in subdivision 2 thereof (A-232) holds that the plan adopted by Clarke County Board of Education was invalid as being in violation of the Civil Rights Act of 1964 (Pub. L. 88-352, Title IV, Section 401; 78 Stat. 246, 42 USCA Chapter 21) (42 USCA, Section 2000c and Section 2000c, 6-a).

In **United States v. Jefferson County Board of Education**, *supra*, 372 F. 2d at 878, the Court of Appeals of the Fifth Circuit clearly held that these provisions of the statute did not make such assignments unlawful. That decision has been followed in several other cases including **United States v. School District 151 of Cook**

County, Illinois (N. D. Ill.), 286 F. Supp. 786, 799; **Keyes v. School District No. 1, Denver, Colorado** (D. Col.), 303 F. Supp. 298; **Spangler v. Pasadena City Board of Education** (C. D. Cal.), 311 F. Supp. 501 (20).

The irrelevancy of such provisions of the Civil Rights Act to the plan adopted by Clarke County Board of Education is probably best stated in **Olson v. Board of Education** (E. D., New York), 250 F. Supp. 1000, on page 1006, as follows: "Plaintiff's assertion that Section 401 (b) of the Civil Rights Act of 1964, 42 U. S. C. A. Section 2000c (b), constitutes a prohibition against any plan to correct racial imbalance is without merit. The definition of the word 'desegregation' in that section relates to the administration of the government aid program in the desegregation of public schools. It has no relevance to the legality or the constitutionality of such a plan."

CONCLUSION

The Board of Education of Clarke County, Georgia, had a duty to take affirmative action to desegregate its schools. Performance of that duty required the transferring of students from formerly segregated schools in such a manner as to mix the races in all schools. In view of limited facilities, the moving of students into a school necessitated the moving of others out by changing of zone lines or otherwise. While the exercise of the Board's discretion in making necessary changes displeased some people, it did not violate their Constitutional rights.

The Equal Protection Clause of the Fourteenth Amendment does not entitle persons to choose which school their child will attend, nor does it prohibit boards of education from arranging attendance zones, transportation routes, and use of buildings and equipment, in such a manner as to best serve the needs of the whole community.

Title IV, Sections 401 and 407 of the Civil Rights Act of 1964 do not restrict boards of education in the exercise of their discretion relative to assignment of students to schools within their school systems.

The judgment of the Supreme Court of Georgia is erroneous, and should be reversed and set aside.

Respectfully submitted,

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(2) Even if racial exclusions in the form of quota, percentage or balance requirements could be said to be constitutionally permissible or required, existing lop-sided enforcement against children, parents, teachers and school districts in Southern States only, constitutes invidious sectional discrimination which in and of itself is violative of rights secured to such persons under the various "due process" and "equal protection" guarantees of the United States Constitution..... 46

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IN THE

Supreme Court of the United States

October Term, 1970

No. 420

CHARLES McDANIEL, et al.,

Petitioners,

-vs-

JOSEPH BARRESI, JR., et al.,

Respondents.

BRIEF OF THE STATE OF GEORGIA AS AMICUS CURIAE

INTEREST OF THE STATE OF GEORGIA

The State of Georgia has many and varied interests in the mental and physical development of its children, not the least of which is that they become productive members of our multiracial, culturally variegated society. The cynic may doubt the truth of this assertion. The concerned and knowledgeable observer will not. The importance to the State of Georgia of a continually improving rather than deteriorating program of public education would seem self-evident. As we will show, the State's ability to achieve this goal is in jeopardy.

QUESTIONS PRESENTED

1. Are attempts of the federal government to impose racial exclusions (i.e., quota, percentage or balance requirements) upon pupils and teachers in Georgia's public schools authorized by the Constitution and laws of the United States?

2. Assuming *arguendo* that the answer to question one is in the affirmative, are attempts to coerce racially motivated exclusions nonetheless prohibited to the government in that they violate transcendental countervailing rights, privileges and immunities which the Constitution and laws of the United States secure to the children, parents, teachers and public school districts of Georgia as well as to the State itself?

3. Assuming *arguendo* that the federal government is authorized by law to impose racial exclusions upon pupils and teachers in the public schools, may it engage in invidious sectional or geographic discrimination in its exercise of this power—coercing only those children, parents and teachers who happen to reside in the Southern States?

STATEMENT

(1) *Nature of the Case.*

Presented for decision is a case involving a local board of education in Georgia which in response to the funds termination power of the United States Department of Health, Education and Welfare adopted racial ratios of black 20% to 40% and white 80% to 60% in all but two of the elementary schools within its jurisdiction. This goal was to be attained by the exclusion of both black and white pupils from the schools nearest their homes or of their choice, solely on the basis of their race

or color, and by assigning these pupils, again solely because of their race or color, to more distant schools—not of their choice. In the two excepted schools, the balance sought was 50% black and 50% white. It appears that these exceptions were made in response to the desire of citizens within the black community to maintain some degree of racial identity in the two schools.

The plaintiffs below (here respondents) are both black and white parents and children. Objecting to being excluded solely for racial reasons from the schools they desire to attend, they filed suit to enjoin implementation of the local school board's plan. Although it is not, in our view of the case, material to the issues presented, we note that each of the pupils either walks or is bused to his (or her) school, depending upon its distance from his (or her) place of abode. The Supreme Court of Georgia held that the racial exclusions were contrary to this Court's ruling in *Alexander v. Holmes County Board of Education,* 396 U.S. 19 (1969), that "no person is to be effectively excluded from any school because of race or color". See *Barresi v. Brown, President of the Clarke County Board of Education, et al.,* 226 Ga. 456, ... S.E.2d ..... (1970). As we will show, the Supreme Court of Georgia was correct.

(2) *Statement of Facts.*

The precise "holding" of *Brown v. Board of Education*[1] was that State-enforced exclusion of black children from a public school pursuant to State laws either "requiring or permitting" segregation by race violated rights secured to such children by the Fourteenth Amendment to the Constitution. In the context of its express prohibition

[1]347 U.S. 483 (1954).

of *State-enforced* racial separation or segregation, there is no doubt but that implementation of the decision has been an unqualified success in those States generically described as "the South". Despite strong emotional as well as intellectual opposition to *Brown*, the overwhelming majority of Southern school officials have long since come to accept the fact that State-enforced racial separation is dead. These officials recognize that black children have a personal, present and unqualified constitutional right to be neither excluded from a particular school because of their race nor required to attend a particular school because of their race.

In Georgia, as in other Southern states, most school districts sought to implement the newly defined "personal right" through adoption of "freedom of choice" plans. In essence, these plans gave each child's parents the right to choose the school their child would attend. While this quite predictably resulted in most students electing to attend schools in which their own particular race was in the majority, it was generally thought that this normal ethnocentric phenomenon was in no way inconsistent with *Brown*. The existence of a truly free choice as to school assignment was *ipso facto* considered to negate the presence of State enforcement respecting the assignment. See e.g., *Bradley v. School Board of the City of Richmond, Virginia*, 345 F.2d 310, 313, 316-17 (4th Cir. 1965); *Briggs v. Elliott*, 132 F.Supp. 776 (E.D.S.C. 1955). [3 judge]. Under this concept of *Brown*, it is a *personal* right which the Fourteenth Amendment protects. This view is thoroughly consistent, of course, with the repeated declarations of this Court that it is "the individual" who is entitled to equal protection of the laws. E.g., *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938);

Sweatt v. Painter, 339 U.S. 629, 635 (1950). As stated in *McLaurin v. Oklahoma State Regents,* 339 U.S. 637, 641 (1950):

> "State-imposed restrictions which produce such inequalities cannot be sustained.
>
> It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think is irrelevant. *There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar.*" (Italics added)

But another view of *Brown* arose. This second view was one which construed the underlying philosophy of that decision not as the vindication of a personal right of black students not to be subjected by the State to racial segregation, but as a broad policy attack against the very fact of racial separation, whether resulting from personal choice, State compulsion or otherwise.[2] It is this view of *Brown* which the federal government has so diligently sought to implement in Georgia and the various other Southern States—while ignoring the fact of racial separation elsewhere. For the South and the South alone, the effort has been one of achieving racial quotas or balance. If in fact and law this second view is the ultimate mandate of *Brown,* it can only be said that while federal officials may have achieved a certain degree of educa-

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[2]The particular alchemy by which the former personal constitutional "right" is converted into a personal constitutional "duty" under the Fourteenth Amendment has never been explained.

tional disaster in the South, implementation has been an abysmal failure nationally.[3]

The scope of the national failure to achieve, approach or even hold even with this second (and we think debased) view of *Brown* is well described by the government's own statistical releases. While the level of racial integration in the public schools of Georgia and the other Southern States has been forced upwards, the national trend has for the most part been in exactly the opposite direction, *i.e.*, towards increased racial separation. The most recent statistical information released by the United States Department of Health, Education and Welfare (January 4, 1970) shows that by the Fall of 1968, the *national* level of racial separation in the public schools had risen to the point where only 23.4 percent of black pupils enrolled in the Nation's public schools were attending schools with a predominantly white enrollment, and further shows that fully 61% of the country's black pupils were enrolled in almost totally (95 to 100 percent) black schools.[4]

Nor can this Nation-wide trend be said to be "newly discovered". Discussing the great increase in racial segregation in the public schools of 15 selected Northern cities[5] between 1960 and 1965, the 1967 report of the

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[3]The totality of the failure has been increasingly recognized by writers, both black and white, who have long been associated with the furtherance of Civil Rights. See e.g., Stewart Alsop, "The Tragic Failure", Newsweek, Feb. 23, 1970; William Raspberry, "Concentration on Integration is Doing Little for Education", The Washington Post, Friday, Feb. 20, 1970.

[4]See U. S. Department of Health, Education and Welfare "HEW NEWS", Jan. 4, 1970.

[5]Cincinnati; Milwaukee; Pasadena; Philadelphia; Pittsburgh; In-

United States Commission on Civil Rights entitled "Racial Isolation in the Public Schools" noted at p. 8:

> "Eighty-four percent of the total Negro increase in these 15 city school systems was absorbed in schools that are now 90-100 percent Negro, and 94 percent in schools more than 50 percent Negro. In Cincinnati, Ohio, the Negro elementary school enrollment doubled over the last 15 years, but the number of Negro children in majority-Negro schools almost tripled. In 1950, 7 of every 10 Negro elementary school children in Cincinnati attended majority-Negro schools. In 1965, nearly 9 of 10 did. In Oakland, Calif., almost half of the Negro elementary school children were in 90-100 percent Negro schools in 1965. Five years earlier, less than 10 percent were. During the 5-year period, Negro elementary school enrollment increased by 4,100 but the number of Negro students in 90-100 percent Negro schools increased by almost 8,000."

The exact increases in percentages of black pupils attending almost all (90 to 100 percent) black schools and

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dianapolis; Cleveland; Oakland; Detroit; Buffalo; San Francisco; Chester; Harrisburg; Springfield, Massachusetts; and New Haven.

predominantly black schools in the specified Northern cities were set forth by the Report as follows:

City	Year	90-100% Negro Enrollment	Majority-Negro Enrollment	Year	90-100% Negro Enrollment	Majority-Negro Enrollment
Cincinnati	1950	43.7	70.7	1965	49.4	88.0
Milwaukee	1950	51.2	66.8	1965	72.4	86.8
Pasadena	1950	0.0	26.2	1965	0.0	71.4
Philadelphia	1950	63.2	84.8	1965	72.0	90.2
Pittsburgh	1950	30.4	51.0	1965	49.5	82.8
Indianapolis	1951	83.2	88.2	1965	70.5	84.2
Cleveland	1952	57.4	84.4	1962	82.3	94.6
Oakland	1959	7.7	71.1	1965	48.7	83.2
Detroit	1960	66.9	91.1	1965	72.3	91.5
Buffalo	1961	80.5	89.4	1965	77.0	88.7
San Francisco	1962	11.6	75.8	1965	21.1	72.3
Chester	1963	71.1	85.8	1965	77.9	89.1
Harrisburg	1963	58.1	82.7	1965	54.0	81.3
Springfield, Mass.	1963	0.0	58.8	1965	15.4	71.9
New Haven	1963	22.5	71.0	1965	36.8	73.4

As for the other side of the racial polarization, the Report showed that the bulk of the white pupils were being permitted to attend virtually all (90 to 100 percent) white schools. It showed the following percentages respecting enrollment of the white pupils in 90 to 100 percent white schools:

Cincinnati	63.0%	Detroit	65.0%
Milwaukee	86.3%	Buffalo	81.1%
Pasadena	82.1%	San Francisco	65.1%
Philadelphia	57.7%	Chester	37.9%
Pittsburgh	62.3%	Harrisburg	56.2%
Indianapolis	80.7%	Springfield, Mass.	82.8%
Cleveland	80.2%	New Haven	47.1%
Oakland	50.2%		

The pattern of increasing racial separation, isolation

or segregation within these particular Northern cities was found by the United States Commission on Civil Rights to be typical of Northern school districts. The Report pointed out that by the 1965-66 school year fully 89.2 percent of Chicago's black students were attending virtually all (90 to 100 percent) black schools while at the same time 88.8 percent of the city's white pupils were being permitted to attend virtually all (90 to 100 percent) white schools. Statistics for some of the other Northern cities, as set forth at pp. 4-5 of the Commission's report, showed the following situation by 1965:

City	% of Negro Pupils in 90-100% Negro Schools	% of Negro Pupils Majority Negro Schools	% of White Pupils in 90-100% White Schools
Richmond, Calif.	32.9	82.9	90.2
San Diego, Calif.	13.9	73.3	88.7
Denver, Colo.	29.4	75.2	95.5
Hartford, Conn.	9.4	73.8	66.2
New Haven, Conn.	36.8	73.4	47.1
East St. Louis, Ill.	80.4	92.4	68.6
Fort Wayne, Ind.	60.8	82.9	87.7
Gary, Ind.	89.9	94.8	75.9
Wichita, Kans.	63.5	89.1	94.8
Baltimore, Md.	84.2	92.3	83.8
Boston, Mass.	35.4	79.5	76.5
Flint, Mich.	67.9	85.9	80.0
Minneapolis, Minn.	None	39.2	84.9
Kansas City, Mo.	69.1	85.5	65.2
St. Louis, Mo.	90.9	85.5	65.2
Omaha, Neb.	47.7	81.1	89.0
Newark, N. J.	51.3	90.3	37.1
Camden, N. J.	37.0	90.4	62.4
Albany, N. Y.	None	74.0	66.5
New York, N. Y.	20.7	55.5	56.8
Columbus, Ohio	34.3	80.8	77.0
Tulsa, Okla.	90.7	98.7	98.8

City (Cont'd.)	% of Negro Pupils in 90-100% Negro Schools (Cont'd.)	% of Negro Pupils Majority Negro Schools (Cont'd.)	% of White Pupils in 90-100% White Schools (Cont'd.)
Portland, Ore.	46.5	59.2	92.0
Providence, R. I.	14.6	55.5	63.3
Seattle, Wash.	9.9	60.4	89.8
Washington, D. C.	90.4	99.3	34.3

The Report concluded at p. 6:

> "Nor does the pattern necessarily vary according to the proportion of Negroes enrolled in the school system. For example, Negroes are 26 percent of the elementary school enrollment in Milwaukee, Wis., and almost 60 percent of the enrollment in Philadelphia, Pa., yet in both cities almost three of every four Negro children attend nearly all-Negro schools. Negroes are 19 percent of the elementary school enrollment in Omaha, Nebr., and almost 70 percent of the enrollment in Chester, Pa., yet in both cities at least 80 percent of the Negro children are enrolled in majority-Negro schools."

Noting that during the time covered by its study (i.e., primarily before 1966 and the start of federal officialdom's intensive efforts to impose racial quota and racial balance requirements upon *Southern* school districts) the level of racial separation was only slightly higher in the South, the Commission concluded at p. 7 of its Report:

> "The extent of racial isolation in Northern school systems does not differ markedly from that in the South."

Due to the lop-sided efforts of the Justice Department and HEW, the Commission's conclusion of substantial similarity between Northern and Southern school systems has become wholly inaccurate. While the general dearth of black pupils in many Northern systems may tend to give misleading statewide figures, examination of rec-

ords of the federal government respecting those Northern school systems which do have any appreciable number of black students clearly demonstrates that these systems have far higher levels of racial separation, isolation and segregation than federal officials have ever been willing to tolerate in Georgia and other States in the South.

Intensification of the disparity of treatment between Northern and Southern school systems respecting racial quota and racial balance requirements began at least as early as 1966. In that year, HEW, apparently unhappy over the way in which black parents and pupils in the South were exercising their "freedom of choice", decided to limit the use of such plans. It decided that henceforth these plans would be acceptable only if the choices were exercised in the way in which HEW officials thought they should be exercised. The March 1966 "Guidelines for School Desegregation" commenced HEW's march towards racial quota or balance requirements as a requisite for continued federal financial assistance. The guidelines announced:

> "The single most substantial indication as to whether a free choice plan is actually working to eliminate the dual school structure is the extent to which Negro or other minority group students have in fact transferred from segregated schools. . . . Where a free choice plan results in little or no actual desegregation, or where, having already produced some degree of desegregation, it does not result in substantial progress, there is reason to believe that the plan is not operating effectively and may not be an appropriate or acceptable method of meeting constitutional or statutory requirements."[6]

[6]See U. S. Department of HEW, "Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964", (March 1966).

HEW indicated that it would be satisfied with the "progress" of local school systems only if:

(1) school districts which had at least 8 or 9 percent of their pupils transfer under such a plan during the 1965-66 school year at least doubled the percentage during the 1966-67 school year,

(2) school districts which had only 4 or 5 percent of their pupils transfer under such plans during the 1965-66 school year at least tripled the percentage during the 1966-67 school year, and

(3) school districts having a lower percentage of transfers achieved a proportionately greater rate of increase for the 1966-67 school year.[7]

The "guidelines" went on to say that if a "freedom of choice" plan did not produce results satisfactory to HEW (i.e., sufficient racial balance) it might "require the school system to adopt a different type of desegregation plan". The racial quota requirements of the March 1966 guidelines were continued in the December 1966 guidelines for the 1967-68 school year.[8]

In March 1968, the United States Department of Health, Education and Welfare published its "Policies on Elementary and Secondary School Compliance with Title VI of the Civil Rights Act of 1964". There HEW announced that in order to continue to receive federal financial assistance, school districts (meaning, of course,

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[7]Ibid.

[8]U. S. Dept. of HEW, "Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964", (Dec. 1966, as amended for the School Year 1967-68).

Southern school districts only) would have to "bring about an integrated unitary school system . . . so that there are no Negro or other minority group schools and no white schools. . . ." The deadline was the 1968-69 school year or, at the latest, the 1969-70 school year. Nor was there any doubt as to the fact that under the lexicon of HEW "integrated unitary school system" *meant* racial balance or at least a reasonable likeness thereof. According to HEW, Southern school systems were to be expected to go beyond freedom of choice and to accept the pairing of schools, closing of schools, reassignment of pupils, and the redrafting of geographic attendance zones to maximize affirmative integration (or, in other words, racial balance).

While HEW was in this manner compelling local school systems in Georgia and other Southern States to accept racial quotas and balance requirements as a condition of continued federal financial assistance, the Department of Justice occupied itself by seeking judicial sanction for its "special treatment" for Southern school systems and pupils. Between enactment of the Civil Rights Act of 1964 and January 1, 1970, the Justice Department initiated or otherwise participated in almost 200 legal actions to compel integration in at least 400 local school districts within the 11 States of the South.[9] Twenty-six of these suits (involving approximately 107 local school systems) were filed within the State of Geor-

[9]Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia. Two of the suits were filed on a statewide basis. One, in Alabama, affected 100 local school districts while the other, against the State of Georgia, affected 81 local school districts. Other cases similarly have involved a multiplicity of school district defendants.

gia alone. In all of the remaining 39 States of the Union, the Department of Justice has seen fit (as of January 1, 1970) to file or otherwise participate in actions against only 8 local school districts.[10]

The Justice Department's initial success in converting the personal constitutional *right* of a pupil not to be excluded from a school or required to attend a school solely because of his race into a *duty* to accept exclusion or assignment for precisely this reason (i.e., his race) was achieved in *United States v. Jefferson County Board of Education,* 380 F.2d 385 (5th Cir. 1967) [en banc]. There, for the first time, the Justice Department persuaded a majority of the Court of Appeals for the Fifth Circuit, at least insofar as Southern schools and pupils were concerned, to abandon the concept of *Brown* as a protection of personal rights of the governed from governmental interference. The new rule was one of Federal power and individual duty. A majority of the Court of Appeals for this Circuit even went so far as to deny that freedom of individual choice was a valid constitutional goal! By dicta, it approved the percentage guidelines or racial quotas established by HEW. As the dissenting opinions so correctly foresaw and so forcefully pointed out, *Jefferson's* disclaimer of any "racial balance" requirement was naught but window dressing. The untimely (although we hope temporary) end at the hands of *Jefferson* of those personal rights and freedoms born of *Brown* is now a matter of public record and common knowledge. Within two years after *Jefferson,* the Fifth Circuit was saying:

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[10]"Defendants' Answers to Certain of the Mitchell Interrogatories", filed in *Georgia, et al. v. Mitchell, et al.,* Civil Action No. 265-70 (D.D.C.), appeal pending, U.S. Court of Appeals for the District of Columbia Circuit, No. 24423.

> ". . . we are firm that a point has been reached in the process of school desegregation 'where it is not the spirit, but the bodies which count'." *United States v. Indianola Municipal Separate School Dist.*, 410 F.2d 626, 631 (5th Cir. 1969).
>
> "The transformation to a unitary system will not come to pass until the board has balanced the faculty of each school. . . ." *United States v. Greenwood Municipal School District*, 406 F.2d 1086, 1094 (5th Cir. 1969).
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> "If there are still all-Negro schools, or only a small fraction of Negroes enrolled in white schools, or no substantial integration of faculties and school activities, then, as a matter of law, the existing plan fails constitutional standards. . . . The board should consider . . . closing all-Negro schools, consolidating and pairing schools, rotating principals, and taking other measures. . . ." *Henry v. Clarksdale Municipal Separate School District*, 409 F.2d 682, 689-90 (5th Cir. 1969).

As a result of this "southern strategy", the imposition of racial quota and racial balance requirements has with but a few exceptions[11] become the pattern within the Fifth Circuit. *Singleton, et al. v. Jackson Municipal Separate School District, et al.*, 419 F.2d 1211 (5th Cir. 1969), ordered a mid-term reassignment of teachers so that as of February 1, 1970, the ratio of black to white teachers in each school would be the same as existed within the entire school system. It was further ordered that student bodies be merged "into unitary systems" by

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[11]In *Ellis v. The Board of Public Instruction of Orange County, Florida*, 423 F.2d 203, 208, 213-16 (5th Cir. 1970), a neighborhood school attendance system was upheld notwithstanding the existence of all-Negro schools in a predominantly white school system.

the Fall of 1970. A district court which held on January 21, 1970, that nothing in the Constitution required racial balance of pupils within the public schools was summarily reversed by the Fifth Circuit on February 5, 1970.[12] As a result of litigation instituted by the federal government directly against the State of Georgia and the State Board of Education, all *State school funds* were ordered to be withheld from some 81 local school systems within Georgia unless such school systems agreed to the implementation of judicially specified racial quotas. See *United States v. The State of Georgia, et al.*, Civil Action No. 12972, N.D. Ga. (Order filed Dec. 17, 1969).

The demoralizing disruption of the educational process in Georgia and in the other Southern States subjected to the discriminatory actions of these federal officials has long been obvious to all who can see and are willing to see. Massive transfers of teachers and pupils have been and are being required without the slightest regard for established teacher-pupil relationships, without the slightest regard for the location of schools and distances to be traveled, without the slightest regard for curricula needs and desires, and without the slightest regard for the individual pupil or teacher and his personal friendships and attachments. Is it at all surprising that about 40% of the State's county and municipal school superintendents have departed from their offices over the past two years? Does this loss of administrative experience somehow further equal educational opportunity?

Nor can the damage to public education in the South

[12] *Bivins, et al. v. Board of Public Education and Orphanage for Bibb County, et al.*, No. 1926 (M.D. Ga., Order filed Jan. 21, 1970), *rev'd. sub nom, Bivins v. Bibb County Board of Education*, 424 F.2d 97 (5th Cir. 1970).

be disregarded upon the highly questionable theory that it is only transitory wreckage during an "adjustment period". How does one calculate the loss of a single competent teacher who forever departs from his chosen profession rather than accept transfer from a school near his residence to a more distant facility? The number of experienced teachers who have departed from the school systems in which they had been teaching is already substantial. Evidence indicates that an even larger number will depart during the current school year. Other teachers, forced by economic circumstances to remain in the school system, become disheartened upon finding themselves not only in a new school, but forced to teach outside the area of their particular competency and choice. Overlooked in the shuffle to achieve racial balance of faculty in each school has been the detail that no correlation whatsoever is apt to exist between the system-wide racial composition of faculty and the black-white ratio for French teachers, science teachers, math teachers, remedial instruction teachers, etc.

Perhaps one of the most lasting of all injuries to public education, an injury which may indeed prove fatal to public education in some areas of Georgia, is the change of attitude of those who ultimately foot the bill for its continuance. Along with parents and pupils, the general public, regardless of race, has become quite disenchanted with a system of public education which takes funds which could be utilized for direct educational expenditures, as for books and teachers' salaries, and requires them instead to be expended to transport children to more distant schools in order to receive racially balanced instruction from a newly transferred teacher who very likely is teaching an unfamiliar subject and thoroughly

unhappy about her transfer in the first place. Nor does the general citizenry appreciate the social value of closing perfectly adequate (not to mention expensive) school facilities in one place in order to spend hundreds of thousands of dollars more for the construction of new facilities elsewhere just because someone thinks (usually erroneously) that more racial integration will result.[13] The dangerous decline of public support for public education renders the defeat of proposed school bond issues at the polls more likely and can cause intense opposition to any increase in taxation for public education. Another ominous aspect of public disenchantment with public education is seen in the sharp increase of actual withdrawal from the public schools. In Taliaferro County, Georgia, for example, the government's efforts resulted in each and every white teacher and each and every white pupil withdrawing from the public school system of that county in favor of either the newly created private schools within the county or public schools elsewhere. See *Turner v. Fouche,* 396 U.S. 346, 349 (1970). Preliminary Fall 1970 enrollment figures for the Atlanta public schools indicate that some 6,000 pupils have withdrawn from this school system, and similar figures for Bibb County (Macon), Georgia indicate that that system has lost 4,000 students. *The Atlanta Constitution,* Vol. 103, No. 67 (Wed., Sept. 2, 1970). Particularly ominous is the fact that it is generally the children of middle and up-

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[13]When, due to the government's racial balance pressures, the Fulton County (Georgia) school system closed the all-black Eva Thomas school in order to transfer its pupils to more distant predominantly white schools, a massive sit-in by black students developed. It ended when the Eva Thomas school was at least temporarily reopened with judicial approval. Then too, people often vote with their feet.

wards economic and social backgrounds who first depart. It is this segment of society which traditionally has been the pillar of local moral and financial support for public education.

Needless to say, the wreckage which thoughtless federal officials have inflicted upon public education in Georgia has caused incalculable injury to the State itself as well as to its citizenry. Hundreds of thousands if not millions of State supplied dollars have been lost through the pressured closing of adequate school facilities. The lessening of Georgia's ability to provide a sound program of public education for its youth, in addition to irreparable injury to those pupils who are unable to afford adequate private instruction, adversely affects the State's competitive position respecting the areas in favor of which federal officials discriminate. Other things being equal, industry will prefer to expand to those states which have not had their educational systems dismantled by the government.

Yet as destructive of public education as racial quotas and balance requirements are, as unsatisfactory as they have proven to be to reduce rather than increase racial polarization and animosity, we reluctantly could accept this punishment if it were to be inflicted equally upon all sections of the Nation—North as well as South. As of now this most demonstrably has not been the case. Nor will it ever become the case if this Court does not take action to end the existing disparity of treatment. The most recent statistics available from the United States Department of Health, Education and Welfare respecting the high but still increasing level of racial segregation in Northern school systems well illustrate that although the War Between the States ostensibly ended over 100

years ago, there continues to be one set of "guidelines" for the South and quite another for the rest of the Nation —one rule for the conquerer and one for the conquered. While we doubt that anyone disputes the national scope of racial separation in public education, we have set forth specific examples, taken from HEW's most recent statistics, in our appendix to this brief. We respectfully refer the Court to the same, thinking that it is worth looking at these few examples of the inordinately high levels of apartheid which have been achieved in Northern school systems without any noticeable interference by the same federal officials who have been so active in the derogation of *meaningful* public education in so many areas of Georgia and the other Southern states.

SUMMARY OF ARGUMENT

Brown v. Board of Education, 347 U.S. 483 (1954), held that a black child cannot be excluded from one school and required to attend another school solely because of his race. All too many governmental officials have misconstrued *Brown* to require that black and white children must be excluded from one school and required to attend another solely because of their race (i.e., to meet racial quota or balance goals).

The situation might be likened to the invalidating of laws requiring black citizens to sit in the rear of a bus. A great many governmental officials are in the position of insisting that the decision requires black and white passengers to be seated according to a percentage or quota system so as to enforce a uniform racial distribution throughout the bus. We object to the government's conversion of a personal right into a personal duty just as

we would object to its equating a citizen's right of religious freedom with a duty to go to church.

The evil is magnified when obeisance to a particular dogma is demanded only of those citizens of the United States who happen to reside in the South.

While we think that the nature of our argument causes attempts to summarize it almost inevitably to result in oversimplification, we would state its principal thrust as follows: Racial quota, percentage or balance requirements are among the most obvious of racial exclusions. An "at least" for one race is a "not more than" for the others. Quota and percentage requirements based upon race are necessarily "a guaranty of inequality of treatment of eligible 'persons' ", *Banks v. Housing Authority,* 120 Cal.2d 1, 260 P.2d 668, 673-74 (1953), and have been uniformly condemned by the courts. See, e.g. *Truax v. Raich,* 239 U.S. 33, 42-43 (1915); *Colon v. Tompkins Square Neighbors, Inc.,* 294 F.Supp. 134, 139. (S.D.N.Y. 1968).

In the field of public education, we read *Brown,* and more recently, *Alexander v. Holmes County Board of Education,* 396 U.S. 19, 20 (1969), as prohibiting State-imposed racial exclusions absolutely and without regard to their form. But whether or not we are correct in this view, and whether or not the latter case meant what it said and said what it meant when it defined the constitutional requisite as a school system:

> "within which no person is to be effectively excluded from any school because of race or color",

we think that constitutional analysis, in the light of many other of this Court's past decisions, impels the conclusion that racial quota, percentage or balance requirements are

as much at war with the Constitution as they are with human dignity and those basic moral foundations upon which we hope our Nation rests. To start with, we think that the federal government lacks any power whatsoever to establish racial quotas for children and teachers in the public schools. This sort of activity simply is not a means which can be said to be reasonably related to the furtherance of any legitimate governmental end or purpose. As we show in our argument, the activities in question actually negate rather than further the legitimate governmental goal (recognized in *Brown*) of equal educational opportunity. In some instances the racial exclusions coerced by federal officials actually serve to guarantee non-education for the poor.

Moreover, even were it to be assumed, *arguendo*, that racial exclusions in the form of quota and balance requirements did reasonably relate to furtherance of the legitimate governmental end of equal educational opportunity, such exclusions are nonetheless prohibited by the Constitution because they are an oversweep in remedy, see e.g. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). They violate transcendental countervailing rights, privileges and immunities secured to parents, pupils and teachers by the First and Fifth Amendments. The rights in question have been well defined by this Court in such cases as *Board of Education v. Barnette*, 319 U.S. 624, 637, 640-41 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); and *Meyer v. Nebraska*, 262 U.S. 390, 399-403 (1923); as well as again more recently in *Epperson v. Arkansas*, 393 U.S. 97, 105-106 (1968).

We agree that State-compelled racial separation is

dead. We do not think, however, that the corpse should be replaced with a procrustean bed of uniform racial balance, which in many areas already threatens public education with loss of vitality if not of life. Other options are available. The ability of local school systems to innovate and experiment ought not to be foreclosed in favor of the same moribund uniformity of educational doctrine (this time it is racial balance) which this Court condemned in *Board of Education v. Barnette,* 319 U.S. 624, 640-41 (1942).

Finally, in the event the Court disagrees with our view that racial exclusions are prohibited by the Constitution regardless of their form or purpose, we urge it to terminate the invidious sectional discrimination which has until now permeated federal enforcement. Surely regional bigotry is as offensive as racial bigotry. How long is the "conquered province" approach to continue? The existing situation, aptly termed a "monumental hypocrisy" by Senator Ribicoff of Connecticut, is well documented by the government's own records, reports and statistical releases—to which we have referred in our fact statement. It is a national scandal for which judicial correction has long been overdue. There can be no such thing as true constitutional government in the United States if the laws of the land mean one thing in Georgia and another in Ohio. If children and teachers must be prodded about to achieve racial balance in Charlotte, North Carolina or Athens, Georgia, what moral or constitutional justification could possibly exist to ignore the situation in Cleveland, Chicago, and New York? This Court has not hesitated to strike far lesser discriminations in the past. E.g. *Yick Wo v. Hopkins,* 118 U.S. 356, 373 (1886); *Dobbins v. Los Angeles,* 195 U.S. 223, 240 (1904). We im-

plore the Court to point out once again that there is but one Constitution for *all* citizens and that children who happen to reside in Georgia also are entitled to its protection.

ARGUMENT

1. GOVERNMENTAL ATTEMPTS TO IMPOSE RACIAL EXCLUSIONS (i.e. QUOTA, PERCENTAGE, OR BALANCE REQUIREMENTS) UPON PUPILS AND TEACHERS IN GEORGIA'S PUBLIC SCHOOLS ARE UNAUTHORIZED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES IN THE FIRST INSTANCE, BUT IN ANY EVENT ARE PROHIBITED IN THAT THEY VIOLATE TRANSCENDENTAL RIGHTS SECURED TO CHILDREN, PARENTS, TEACHERS AND THE STATE ITSELF UNDER SAID CONSTITUTION AND LAWS.

Persons concerned with human dignity have almost universally looked upon quota or percentage requirements based upon race with revulsion. The unsavory practice of some colleges of establishing quotas for the admission of certain religious minorities, the subject of heated debate in the '30s and '40s, is for the most part but an unpleasant memory today. More recently, the inherently arbitrary and discriminatory nature of ethnic and racial quotas has led to drastic revision of our National Immigration Laws so as to eliminate their consideration in determining who shall be admitted into the country. See, 79 Stat. 911, 8 U.S.C. §§ 1151 et seq; 1965 *U. S. Code and Admin. News,* pp. 3328-3354. Needless to say, it matters not whether the quota or

percentage is cast in terms of "at least" or "not more than". One quite necessarily includes the other.[14]

We think it obvious that the question of whether these roundly condemned racial quotas or percentages can be constitutionally imposed by governmental authority in the field of public education requires two related yet different inquiries. Inasmuch as the federal government and its officers are possessed of but limited powers under our federal system, the first inquiry must be whether under the Constitution and laws of the United States the federal government legally is empowered to take any action at all respecting racial quota or percentage exclusions in the public schools. Then, assuming that the federal government does have power to act in the matter, we must look to see whether there exist limitations upon its exercise by way of transcendental countervailing rights, privileges or immunities secured to parents, pupils and teachers under the Constitution and laws of the United States. In a somewhat analogous situation involving a compulsory salute to the flag,[15] this Court explained in *Board of Education v. Barnette*, 319 U.S. 624, 635 (1942):

> "It is not necessary to inquire whether nonconformists beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty."

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[14]An "at least" for one race is a "not more than" for the other. Hence a racial quota, percentage, number or balance requirement is one of the clearest possible forms of racial exclusion. It also is rather important to note that the race which is the majority varies from school district to school district.

[15]Here the federal government seeks to compel school assignments based wholly on race in order to achieve racial balance or quotas.

(a) *The government of the United States is without legal authority to impose racial exclusions by coercing school attendance in such manner as to achieve any particular balance, quota, number or percentage requirement for a given race in a given school.*

It must be emphasized that we do not attack the holding of *Brown* that State-enforced segregation according to race is violative of the Fourteenth Amendment. To the extent that it is a vindication of the present and unqualified constitutional right of a pupil to be neither excluded from nor forced to attend any particular school solely because of his race, we indeed insist upon *Brown*. It is exactly this right which the federal government denies. The situation may be likened to the invalidating of a law requiring a black citizen to sit in the rear of a bus. We do not in the least object to the substitution of a personal right and freedom (to sit anywhere) in place of his former duty and obligation (to sit in the rear). To the contrary, we insist upon this personal right and freedom. What we object to is the bus conductor seizing the body of any black citizen who happens to choose a seat in the rear and dragging him forward against his will to compel him to sit beside someone just because the someone is white. We strenuously object to this conversion of the black citizen's newly acquired constitutional right and freedom into a governmentally imposed duty.

In attempting to fathom the claimed legal basis (if any) for any governmental official's self-asserted power to deny individual freedom and liberty to both black and white pupils and teachers respecting school assignment (apparently upon a "democracy doesn't work" theory) and substitute in its place a duty on the part of individuals of both races to submit to such racial quota,

percentage, or number requirements as the federal official may from time to time deem appropriate, it would seem that the approach sanctioned by this Court is to define first the governmental purpose or objective to be served, which must itself be legitimate, and then, in light of this purpose or objective, to examine the means to see if they are appropriate and reasonably related to attainment of the goal. Particularly is this so where as here the selected means constitutes an obvious deprivation of individual liberty. In a similar setting of attempted governmental restraint upon parental rights and liberties respecting their children's education, *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923), this Court explained:

> "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect."

In *Meyer*, the governmental purpose had been defined as the desire for unity and the development of a more homogeneous people who would be imbued with American ideals. To this end Nebraska adopted as its means a statute prohibiting the teaching of a foreign language to any child prior to his completion of the eighth grade [the thought being that this would provide a common cultural base by making English the mother tongue of all]. While the Court agreed that it might be highly advantageous if everyone had a ready understanding of our ordinary speech, it pointed out in no uncertain terms that even this presumably valid legislative end did not justify a means which resulted in the deprivation of personal freedom. It rejected the means chosen by *Nebraska*. At 262 U.S. 403, the Court said:

> "No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State."

The *Meyer* principle of rejecting undue restrictions upon the liberty of teachers and pupils was quite recently reaffirmed in *Epperson v. Arkansas,* 393 U.S. 97, 105 (1968).

Looking first to what valid governmental purpose or objective racial quota requirements are supposed to serve, we obviously must start out by rejecting such cant as "necessity of dismantling the dual school system" and the acceptability of desegregation plans only if "they work". Such semantical shibboleths, aside from the fact that they obfuscate rather than clarify, utterly fail to answer "why" and hence, like the terms "desegregation" and "integration" themselves, are really concerned only with the "means". While they sometimes are, they really ought not to be confused with (much less equated with) the ultimate governmental purpose or objective to be served.

In defining just what the legitimate governmental goal is, it is perhaps best to return to the taproot of the entire question, *Brown v. Board of Education,* 347 U.S. 483 (1954). In speaking of the inherent *inequality of educational opportunity* when students are compelled by law to attend racially segregated schools, it appears to be quite clear that this Court viewed the primary vice of such legally-enforced apartheid to be the psychological effect upon the hearts and minds of black pupils. The Court said at 347 U.S. 494:

"To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.' Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson,* this finding is amply supported by modern authority."

The rationale of *Brown,* in other words, was that State-compelled segregation according to race engendered feelings of inferiority in the black student which precluded the possibility of "equal educational opportunity". It is, in other words, "equal educational opportunity" which is the right protected by the Fourteenth Amendment. It is the protection or furtherance of this right which is *ipso facto* the legitimate goal or purpose of the Federal government. Subsequent decisions of the Court have continued to demonstrate that in protecting this *personal* right it is the harmful effect of State *compulsion* (and not the consequences of individual freedom

of association) which is the proper object of governmental attack. In *Loving v. Virginia,* 388 U.S. 1, 10 (1967), it was said:

> "The clear and central purpose of the Fourteenth Amendment was to eliminate *all official state sources* of invidious racial discrimination in the States." (Italics added)

Similarly, in one of its most recent decisions concerning school desegregation, the Court again stated the matter in terms of State-enforced racial separation when in *Alexander v. Holmes County Board of Education,* 396 U.S. 19, 20 (1969), it referred to the termination of a dual school system and coming into being of a unitary system as the point where the system is one:

> "within which no person is to be effectively excluded from any school because of race or color."

We do not dispute the fact that racial quota, percentage and balance requirements constitute a means of eliminating this constitutionally impermissible barrier (State-compelled segregation) to the legitimate governmental goal of equal educational opportunity. But the test is not whether the means removes a barrier to the end. It is achievement of the end itself to which the means must be appropriate and reasonably related. A means which merely supplants the old impediment with a new one does not necessarily bring the goal closer. The precise question to be answered is whether the racial exclusions currently coerced by governmental officials (in the form of racial quota, percentage or balance requirements) are appropriate and reasonably related to the legitimate governmental goal of "equal educational opportunity".

In answering this question, it is perhaps appropriate

that we first pause to consider just what "equal educational opportunity" is. A simplistic answer, of course, is that each and every child, regardless of background and desires, regardless of whether he is mentally retarded or a child prodigy, must receive exactly the same education. Yet we doubt that anyone in this or any related case will argue in favor of this equality of input and devil take the hindmost approach to public education. More likely we will find a rather general agreement that the ultimate goal of public education is to make available to each child (a highly individual and complex being) that variety and degree of learning which he needs, desires, and is capable of absorbing. Looking at "equal educational opportunity" in the light of this goal (which we assume to be quite generally accepted), we see that uniformity of educational treatment is in fact the antithesis of "equal educational opportunity". One of the advantages of open enrollment, for example, is the very fact that schools can differ, that they can have varying curricula and standards which can be designed to meet the particular needs and desires of the children who choose to attend each particular school. Needless to say, this progressive approach to education is completely ruled out where the school assignments are made on a racial basis rather than upon the students' needs, desires and aptitudes.

For this reason among others we think that the correct answer to the question is that racial quota, percentage, number or balance requirements have no place in public education. As a means, they are inappropriate and not reasonably related to the legitimate governmental goal of equal educational opportunity. In too many instances, they instead absolutely preclude attainment of the goal. As we have previously shown, the factual result

of such racially motivated assignment, regardless of high-flown theory, in all too many school systems has been but a general deterioration of public education for all. Pupils and teachers who find themselves assigned to schools and excluded from others solely because of their race—in order to achieve what some governmental official at a given moment deems to be a suitable racial blend (seemingly in direct contradiction of what this Court said in *Alexander v. Holmes County, supra*), are not apt to be at their teaching and learning best. Their sense of frustration is increased when they are forced to teach and study outside of the areas of their needs, desires and aptitudes. It is increased further when they are required to get up earlier and arrive home later—in order to travel longer distances to the school they have no desire to attend in the first place. Too often the net result has been physical withdrawal from and consequential resegregation of the public schools, accompanied by diminished financial support generally. In referring to the utter failure of such racial quota or percentage requirements to achieve even the immediate and improper ambition of federal officials (i.e., varying degrees of racial balance), Professor Alexander M. Bickel states in "Desegregation, Where Do We Go From Here?":[16]

> "But whatever, and however legitimate, the reasons for imposing such requirements, the consequences have been perverse. Integration soon reaches a tipping point. If whites are sent to constitute a minority in a school that is largely black, or if blacks are sent to constitute something near half the population of a school that was formerly white or nearly all

[16]The New Republic, Feb. 7, 1970, pp. 20, 21. Professor Bickel, long having been associated with the vanguard of the civil rights movement, can scarcely be dismissed as a "racist".

> white, the whites flee, and the school becomes all or nearly all-black; resegregation sets in, blacks simply changing places with whites. They move, within a city or out of it into suburbs, so that under a system of zoning they are in white schools because the schools reflect residential segregation; or else they flee the public school system altogether, into private and parochial schools."

Professor Bickel asks:

> "What is the use of a process of racial integration in the schools that very often produces, in absolute numbers, more black and white children attending segregated schools than before the process was put into motion?"

There is no doubt as to the fact that in other civil rights arenas, the courts have looked upon racial quotas with something less than approval. In the context of racial quotas in public housing it was stated of such a requirement in *Taylor v. Leonard,* 30 N.J. Super. 116, 103 A.2d 632, 633 (1954):

> ". . . it is also a violation of section 1 of the Fourteenth Amendment of the Constitution of the United States.
>
> It is immaterial that the quota actually used bears some relation to the percentage of Negro population in the particular municipality.
>
> The evil of a quota system is that it assumes that Negroes are different from other citizens and should be treated differently. Stated another way, the alleged purpose of a quota system is to prevent Negroes from getting more than their share of the available housing units. However, this takes for granted that Negroes are only entitled to the enjoyment of civil rights on a quota basis."

Similarly (and more recently) in *Colon v. Tompkins*

Square Neighbors, Inc., 294 F.Supp. 134, 139 (S.D.N.Y. 1968), the district court declared:

> "The 'Tenant Selection Policy and Guidelines' submitted to this Court by defendant Tompkins Square is basically sound. However, the document, in its reference to the desirability of a 'balanced tenant body' vaguely smacks of a quota system which in the opinion of this Court, represents a constitutionally impermissible process requiring arbitrary rejection of applicants after a set quota has been met."

In striking such a racial quota or percentage system respecting public housing, it has been noted that quotas based upon race bear no relationship to individual eligibility and in reality constitute:

> ". . . an arbitrary method of exclusion, a guaranty of inequality of treatment of eligible 'persons' ",

and that:

> "[i]t is the individual, . . . who is entitled to the equal protection of the laws, — not merely a group of individuals or a body of persons according to their numbers." *Banks v. Housing Authority,* 120 Cal.App. 2d 1, 260 P.2d 668, 673-674 (1953).

Another trouble with quotas and the exclusions they necessarily entail was pointed out in *Truax v. Raich,* 239 U.S. 33, 42-43 (1915). In holding quotas respecting alien employment rights unconstitutional under the Fourteenth Amendment, this Court observed:

> "If the restriction to twenty per cent, now imposed is maintainable the State undoubtedly has the power if it sees fit to make the percentage less!"

The existence of racial quotas would presumably require constant quota readjustments as the racial composition of the body upon which the quotas are based changes, if

not for other reasons which might from time to time be deemed appropriate by those who govern. The best way to avoid the problem is obviously to avoid its beginnings. See *Board of Education v. Barnette,* 319 U.S. 624, 641 (1942).

Returning to the field of public education, we think the vices of racial quotas and their consequential racial exclusions are of no different import in the constitutional sense. We find it difficult to see any rational connection at all between the *Brown* theory of psychological injury to a black child through *State-imposed racial exclusion* and the situation where a black child attends a predominantly black or even all-black school because he *personally desires* to do so due to his preference for companionship with members of his own race, because he considers it to be the best school for his own personal educational needs and desires, or because it is the school closest to his home. In the latter situation, the dangers of psychological injury (and denial of equal educational opportunity) are manifestly much less than where he is required to attend a school he doesn't want to attend—once again simply because he is black.

Because the racial exclusions we have described are contrary to the Constitution, they are outside the executive, legislative and judicial powers of the United States. To the extent that any court order requires them, it is unconstitutional and a complete nullity. See e.g., *Erie Railroad Company v. Tompkins,* 304 U.S. 64, 78-80 (1938); *United States v. Walker,* 109 U.S. 258, 265-66 (1883); *Windsor v. McVeigh,* 93 U.S. 274 (1876); *Fay v. Noia,* 372 U.S. 391, 423 (1963).

(b) *Even if a rational connection could be said to exist between the legitimate governmental goal of prohibiting State-required racial separation and the imposition of racial quotas as one available means of achieving this legitimate end, such means is a remedial oversweep which violates transcendental countervailing rights, privileges, and immunities secured to parents, pupils, teachers and the State by the Constitution and laws of the United States.*

In *Shelton v. Tucker,* 364 U.S. 479, 488 (1960), it was said:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

And in *Griswold v. Connecticut,* 381 U.S. 479, 485 (1965), the Court referred to:

> ". . . the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the areas of protected freedoms'."

Where, as here, it is a First Amendment right which federal officials seek to abridge (to wit: the right of association), even a rational connection between the means and the end will not by itself suffice. Here there must be a "compelling reason" to justify the government's interference with the protected right. E.g., *Board of Edu-*

cation v. Barnette, 319 U.S. 624, 639 (1942). As stated in *NAACP v. Alabama,* 357 U.S. 449, 460-61 (1958):

> "Of course it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."

This principle has long been recognized by this Court in the context of parental freedom respecting the education of their children. In *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35 (1925), the Court struck a statute which required children to attend public as opposed to parochial or private schools, saying:

> "Under the doctrine of *Meyer v. Nebraska,* 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interfers with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

It cannot seriously be debated that the parental right to guide one's child intellectually, culturally and religiously, is a most substantial part of the liberty and freedom of the parent. The means currently favored by federal officials (i.e., racial quota, percentage, number or

balance requirements) to insure abrogation of those phychological barriers to "equal educational opportunity" caused by state-compelled racial separation, sweep far too broadly into this area of constitutionally protected freedoms. It may be true that some still believe that a racially balanced classroom is educationally beneficial and hence should be an end in itself. It is also factually quite obvious that many parents disagree. But be this as it may, it is settled that the First Amendment does not permit the imposition of any uniform educational dogma, process or set of beliefs upon each and every school district, school, parent, pupil and teacher in the land. As pointed out in *Board of Education v. Barnette*, 319 U.S. 624, 637 (1942):

> "Free public education, if faithful to the idea of secular instruction and political neutrality will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system."

With particular relevance to the oversweep of present governmental efferts, it was also observed in *Barnette:*

> "National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement. Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate

methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." 319 U.S. *at* 640-41.

The vitality of this principle was again pointed out in the recent case of *Epperson v. Arkansas,* 393 U.S. 97, 106 (1968), where after reiterating that the First Amendment did not tolerate laws that cast a pall of orthodoxy over the classroom, this Court said:

"There is and can be no doubt that the First Amendment does not permit the State to require that teach-

ing and learning must be tailored to the principles or prohibitions of any religious sect or dogma."

It is significant to note that the dogma of "racial balance" would among other things absolutely preclude fulfillment of the educational aspirations espoused by growing numbers of the leaders of the black community. As Professor Bickel tells us:

> "Polls asking abstract questions may show what they will about continued acceptance of the goal of integration, but the vanguard of black opinion, among intellectuals and political activists alike, is oriented more toward the achievement of group identity and some group autonomy than towards the use of public schools as assimilationist agencies. In part this trend of opinion is explained by the ineffectiveness, the sluggishness, the unresponsiveness, often the oppressiveness of large urban public school systems, and in part it bespeaks the feeling shared by so many whites that the schools should, after all, be an extension of the family, and that the family ought to have a sense of class and cultural identity with them. And so, while the courts and HEW are rezoning and pairing Southern schools in the effort to integrate them, Negro leaders in Northern cities are trying to decentralize them, accepting their racial character and attempting to bring them under community control. While the courts and HEW are reassigning faculties in Atlanta to reflect the racial composition of the schools and bring white teachers to black pupils and black teachers to white ones, Negro leaders in the North are asking for black principals and black teachers for black schools."[17]

While this sort of community control over public education may not be constitutionally required, it is hard to

[17]The New Republic, Feb. 7, 1970, pp. 20, 22.

see why the Constitution must make any accommodation of the black community's aspirations in the matter impossible. Presumably, it is the common goal of all to provide the best possible education for each and every child within our public school systems. Are there really no constitutionally permissible alternatives to the present juggling about of pupils and teachers (without any apparent regard for their highly individualized educational needs, goals and desires) simply to achieve a well-blended color scheme? Is this "equal educational opportunity"? Must all opportunity for innovation in public education be sacrificed with appropriate *te deums* to ever higher levels of racial balance? Must any plan for decentralization to achieve greater parental or community control be scuttled in favor of ever larger educational parks and complexes designed to bring about greater racial, economic and social homogenization—with the inevitable lessening of the power of parents and communities to shape the destinies of their own children? Are the fundamental rights of parenthood of which this Court so eloquently spoke in *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35 (1925) and *Meyer v. Nebraska,* 262 U.S. 390, 399-400 (1923), to be discarded in obeisance to the notion that those who govern care more for children than those who gave them life? We think it a singular as well as tragic commentary on our times that these questions of basic human liberty need even be asked.

Under either the traditional neighborhood school form of organization or under an open enrollment plan, it would be possible, for example, to permit any remaining racially or ethnically concentrated schools to design educational programs adopted to the particular educational needs and goals of that group, and in a degree which very

likely would not be practicable in a racially and ethnically balanced school. If the black community desires its children's education be shaped in part to enhance black cultural identity, why is this any more unconstitutional than conducting elementary grades in Spanish in certain public schools of New York or Miami which have a preponderance of Spanish-American pupils, or than allowing German-speaking citizens of Nebraska to maintain their particular cultural heritage? See *Meyer v. Nebraska*, 262 U.S. 390 (1923). Diversity has made this country great. Stagnation would be the result of uniformity—not national unity. As Professor Bickel observes:

> "There are black schools all over the country. We don't really know what purpose would be served by trying to do away with them, and many blacks don't want them done away with. Energies and resources ought to go into their improvement and, where appropriate, replacement. Energies and resources ought to go into training teachers, and into all manner of experimental attempts to improve the quality of education. The involvement of cohesive communities of parents with the schools is obviously desired by many leaders of Negro opinion. It may bear educational fruit, and is arguably an inalienable right of parenthood anyway. . . ."[18]

That the Constitution and laws of the United States were never intended to permit the federal government and its officials to go as far as they have gone in disrupting public education and in destroying the constitutionally protected right of association is, or at least should be, obvious. We have already referred to the fact that any racial quota, percentage or balance requirement under

[18]The New Republic, "Desegregation, Where Do We Go From Here?", pp. 20, 22 (Feb. 7, 1970).

the guise of enforcing the Fourteenth Amendment is, constitutionally speaking, a conceptual monstrosity. It completely overlooks basic facts as to what the Fourteenth Amendment is all about. As we have already pointed out, it overlooks the fundamental fact that the Amendment was designed to afford personal rights to individuals and protect them against the arbitrary exercise of governmental power — not to expand governmental power at the expense of individual and personal rights. In *Brown v. Board of Education,* 347 U.S. 483 (1954), this Court declared that individual and personal rights protected by the Fourteenth Amendment included the right of an individual not to be excluded from or assigned to a public school solely on the basis of his race (with a correlative governmental duty not to deny or interfere with the individual's exercise of this right). The imposition of racial quota, percentage or number requirements by the federal government is a complete denial of the Fourteenth Amendment personal right enunciated by *Brown.* It is nothing less than the conversion of this personal constitutional right into a personal constitutional duty to attend a school to which one has been assigned solely and exclusively because of one's race (with a correlative governmental right to determine school exclusions and assignments on a racial basis, regardless of the pupil's desires and needs).[19]

It is undoubtedly this precise sort of perversion of the Constitution which Congress sought to guard against when it enacted the Civil Rights Act of 1964. While gov-

[19]See, *Perry,* "Racial Imbalance and the Fourteenth Amendment—Equal What?", 52 A.B.A. Journal 552 (1966) [Mr. Perry is of counsel for the State in the instant case]; *Bickel,* "The Supreme Court and the Idea of Progress", Harper & Row (Feb. 1970).

ernmental officials have paid litle heed to any of the restraints or limitations of this Act in their dealings with the school systems of Georgia and the other Southern States, it expressly provides in Title IV that:

> " 'Desegregation' means the assignment of students to public schools and within such schools *without regard* to their race, color, religion, or national origin, but *'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance.*" 42 U.S.C. § 2000c(b) (Italics added)

The complete ignoring by HEW of all of the italicized restraints in its dealings with Southern school districts is a matter of public record. Racial quota, percentage or number requirements manifestly require the assignment of students to public schools *with regard* to their race and needless to say are in direct violation of the legislative mandate.

In authorizing suits by the Attorney General on behalf of pupils being deprived "by a school board" of the equal protection of the laws, Title IV also provides:

> ". . . nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance. . . ." 42 U.S.C. § 2000c-6(a).

The ignoring of this restraint by recent occupants of the Office of Attorney General has been as open and flagrant as has been that of the various HEW Secretaries respecting 42 U.S.C. § 2000c(b). Too many federal officials still think of the rule of law as something with which only Southern school districts need concern them-

selves. The Act also has been totally ignored as to its limitation of Federal financial assistance terminations to situations of "actual exclusion" of an individual from participation in a federally assisted program due to race, color or national origin, or his being:

> ". . . *subjected to* discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. (Italics added)

Despite the fact that it is plainly impossible for anyone to be "subjected" to anything concerning which he has a choice, federal officials have continued to ignore this limitation, and have enforced racial balance, quota, number or percentage requirements (however labeled for word game purposes) regardless of the desires of the parents, pupils and teachers involved. These governmental officials, in other words, have not only violated and perverted the spirit and letter of the Constitution but have also directly ignored the Congressional mandate in the matter.[20] It is respectfully submitted that any imposition of racial exclusions (i.e., quota, percentage, number or balance requirements) upon teachers and pupils in the public schools of Georgia or any other state is as obnoxious to the Constitution and laws of the land as it is to human liberty and dignity.

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[20]The possibility of Congressional relief is unlikely. With the exception of a few courageous men such as Senator Ribicoff, it does not appear that many Northern congressmen are willing to don sackcloth and ashes over educational injury to Southern children only—particularly where they, politically speaking, retain the best of both worlds by perpetuation of the discrimination against the South (as a scapegoat) while avoiding similar disruption of the educational process in their own constituencies.

2. EVEN IF RACIAL EXCLUSIONS IN THE FORM OF QUOTA, PERCENTAGE OR BALANCE REQUIREMENTS COULD BE SAID TO BE CONSTITUTIONALLY PERMISSIBLE OR REQUIRED, EXISTING LOP-SIDED ENFORCEMENT AGAINST CHILDREN, PARENTS, TEACHERS AND SCHOOL DISTRICTS IN SOUTHERN STATES ONLY, CONSTITUTES INVIDIOUS SECTIONAL DISCRIMINATION WHICH IN AND OF ITSELF IS VIOLATIVE OF RIGHTS SECURED TO SUCH PERSONS UNDER THE VARIOUS "DUE PROCESS" AND "EQUAL PROTECTION" GUARANTEES OF THE UNITED STATES CONSTITUTION.

The disparity between the treatment accorded the South and that accorded the rest of the Nation in connection with the factual separation of black and white pupils in the public schools is a national scandal. Senator Ribicoff of Connecticut openly admits that the North is guilty of "monumental hypocrisy" in the matter and in an interview, Vice President Spiro Agnew expresses the hope the courts will act so that "the lack of evenhandedness in treating North and South would disappear". In a concurring opinion in *Northcross v. Board of Education of The Memphis, Tennessee City Schools,* 397 U.S. 232, 236-37 (1970), Mr. Chief Justice Burger states that the constitutionality of racial percentage requirements (which the Justice Department and HEW have been seeking to foist upon Southern children since 1966) should be resolved by the Supreme Court as soon as possible. Professor Alexander M. Bickel, a constitutional law authority of impeccable credentials among civil rights advocates, asks:

> "On a normative level, is it right to require a small rural and relatively poor segment of the national population to submit to a kind of schooling that is disagreeable to them (for whatever reasons, more or less unworthy), when we do not impose such schooling on people, in cities and in other regions, who also dislike it (for not dissimilar reasons, more or less equally worthy or unworthy)?"[21]

We indeed find it quite difficult to see how anyone can view the so well recognized invidious sectional discrimination respecting the imposition of racial quota, number, percentage or balance requirements with anything less than moral outrage. Past and present governmental activities have been at odds with the Biblical injunction of Matthew 7:3-5 and Luke 6:41-42 to say the least. It is of greater importance only with respect to this particular case and this Court's adjudication of the same that the government's actions are also violative of (a) Article IV, Sec. 2, Par. 1 of the Constitution of the United States,[22] (b) the "due process" clause of the Fifth Amendment thereto, and (c) the "equal protection" standards enunciated by the Fourteenth Amendment and rendered applicable to the federal government by the Fifth, Ninth and Tenth Amendments to the Constitution.

All of these provisions, of course, relate to those basic jurisprudential concepts of essential fairness embodied in "due process" and "equal protection". Factually speaking, controversies involving these concepts most frequently have arisen under the Fourteenth Amendment, which by its terms is applicable only to the States and

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[21]The New Republic, "Desegregation, Where Do We Go From Here?", pp. 20, 21 (Feb. 7, 1970).

[22]"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

does not bind Federal officials. It is now settled, however, that by virtue of other constitutional provisions these same standards are fully applicable to arbitrary actions and essential unfairness on the Federal level. In *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954), it was said that:

> "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."

This incorporation of the "equal protection" clause into the "due process" clause was continued in *Griswold v. Connecticut,* 381 U.S. 479, 487 (1965), where Chief Justice Warren, Justice Goldberg and Justice Brennan, in their concurring opinion, referred to *Bolling v. Sharpe, supra,* as having derived an "equal protection" principle from the Fifth Amendment's "due process" clause, and where the dissenting opinion of Justices Black and Stewart stated that the entire bill of rights, including the "due process" clause of the Fifth Amendment, was a guarantee that all persons would receive equal treatment under the law. Virtually all recently reported decisions in point appear to have adopted the view that the "equal protection" standards of the Fourteenth Amendment are also constitutionally guaranteed under the "due process" clause of the Fifth Amendment. See, e.g., *Harrell v. Tobriner,* 279 F.Supp. 22, 25 (D.D.C. 1967) [3 judge],

aff'd., 394 U.S. 618 (1969); *Brown v. McNamara*, 263 F.Supp. 686, 691 (D.N.J.), *aff'd.*, 387 F.2d 150 (3d Cir. 1967); *Todd v. Joint Apprenticeship Committee*, 223 F.Supp. 12, 19-20 (N.D.Ill. 1963). As stated by Judge Edgerton in his concurring opinion in *Fulwood v. Clemmer*, 111 U.S.App.D.C. 184, 295 F.2d 171, 174 (D.C. Cir. 1961):

> "Though the equal protection clause of the Constitution applies in terms only to the states, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."

In addition to the Fifth Amendment, we think that the right of the State of Georgia and the right of parents, pupils and teachers, to receive substantial equality of treatment respecting the application and enforcement of Federal law, is also protected by the Ninth Amendment, which declares:

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people,"

and by the Tenth Amendment, which provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In *Griswold v. Connecticut*, 381 U.S. 479, 488-99 (1965), Justice Goldberg indicated that the framers of our Constitution inserted the Ninth and Tenth Amendments to make it abundantly clear that the enumeration in the first eight amendments of certain specified rights reserved to the people (and therefore not subject to encroachment by the new and somewhat feared Federal government) were never intended to be construed as ex-

haustive of the fundamental rights which the Constitution gurantees to the people. Those other fundamental rights, or, in other words, those rights of such nature as to cause their denial to be violative of those fundamental principles of liberty and justice which lie as the base of all of our civil and political institutions, are protected by the Ninth and Tenth Amendments. That the concept of "equal protection" before the law (with its corollary prohibition of irrational and capricious classifications) is one of those "fundamental principles of liberty and justice" upon which our government is based would seem to be self-evident. But if any doubt ever could have been said to have existed on the matter, it was resolved in *Harper v. Virginia Board of Elections,* 383 U.S. 663, 667 (1966), where the court stated:

> "This [the equal protection clause] is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of 'government of the people, by the people [and] for the people.' "

We do not overlook the fact that the Attorney General possesses broad authority to institute, control or dismiss legal proceedings brought on behalf of the United States. Nor are we unaware of the discretion of the Secretary of the United States Department of Health, Education and Welfare in his administration of those laws which Congress has placed in his hands. But it is axiomatic that neither the Attorney General, nor the Secretary of HEW, nor any other official of the United States, stands above the law. None, from the President on down, can lawfully act without regard to the constitutional and statutory limitations upon the exercise of the power of his office. See e.g., *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 585-89 (1952). As Mr. Justice

Holmes stated over 40 years ago:

> "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." *Myers v. United States,* 272 U.S. 52, 177 (1926) [dissenting opinion].

Thus the broad power of the Attorney General has constitutional limitations. One such limitation is that he cannot enforce the law in an arbitrary and discriminatory manner. We think a court would pay little heed to any contention that his "discretion" enabled him to enforce narcotics laws only against black citizens, or the antitrust laws only against Michigan, Indiana, Illinois or Ohio corporations. Invidious sectional discrimination in enforcement of uniform national civil rights statutes permits of no different rule. Even if existing governmental practices, conduct and actions were lawful (we believe we have already shown quite clearly that they are not), the present lop-sided enforcement of the law would be violative of well-settled constitutional guarantees. In *Yick Wo v. Hopkins,* 118 U.S. 356, 373 (1886), this Court, in reviewing a municipal ordinance enforced only against Chinese, declared:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Dobbins v. Los Angeles, 195 U.S. 223, 240 (1904), cited *Yick Wo* as authority for the proposition that al-

though a law might be lawful upon its face and apparently fair in its terms:

> ". . . if it was enforced in such a manner as to work a discrimination against a part of the community for no lawful reason, such exercise of power would be invalidated by the courts."

The continued vitality of this settled constitutional concept of nondiscriminatory enforcement of the laws being required by "due process" and "equal protection" is seen in such recent cases as *Dixon v. District of Columbia,* 129 U.S.App.D.C. 341, 394 F.2d 966, 968 (D.C. Cir. 1968), where the court of appeals observed that even the almost unlimited discretion of a prosecutor to drop or press charges could run afoul of the "equal protection" clause (as applied to the Federal Government by the "due process" clause of the Fifth Amendment), if the prosecutor employed an impermissible classification in deciding who would and who would not be prosecuted. *Cain v. Bowles,* 4 F.R.D. 504, 505 (D. Ore. 1945), explained in language applicable to either the Attorney General or the Secretary of HEW:

> "The Administrator's discretion, like all discretion involving the exercise of power is a legal discretion, and must be fairly exercised on a consideration of the whole record. No citation of authority is necessary for this fundamental proposition." 4 F.R.D. *at* 505-06.

Scores of this Court's decisions have reached this same conclusion. See, e.g., *Social Security Board v. Nierotko,* 327 U.S. 358, 369 (1945); *Dismuke v. United States,* 297 U.S. 167, 172 (1936); *Kwock Jan Fat v. White,* 253 U.S. 454, 457-58 (1920); *American School of Magnetic Healing v. McAnnulty,* 187 U.S. 94 (1902).

Frankly, we think the invidious sectional discrimination of which we complain is so well known as to be a matter of judicial notice. As already pointed out, it has been fully acknowledged by the Vice President of the United States as well as such civil rights stalwarts as Senator Ribicoff and Professor Bickel. We would hope that justice is not deaf as well as blind and that geographic bigotry will no longer be countenanced by the courts. The statistical information set forth both in this brief and in the appendix thereto is but illustrative of what is found in the government's own reports. These figures speak in a most stentorian manner. They crystalize that which everyone already knows, serving to point out the enormity of the present sectional discrimination, particularly in light of the high national level of factual racial separation within the public schools. While it would serve no valid purpose to review these startling statistics once again, it does bear repeating that even prior to the government's massive assault upon the children, teachers, parents and schools of Georgia and the other Southern States, the United States Commission on Civil Rights had concluded that the extent of racial separation, isolation or segregation in Northern school systems did not differ markedly from that in the South.[23] It also bears emphasis that outside the South such factual racial separation, isolation and segregation has been permitted to grow without any real hindrance or interference by federal officials, since the 1967 Report of the Civil Rights Commission, to the point where the government's most recent statistics show that in the Nation as a whole only 23.4 percent of all black pupils enrolled in the public schools were attending predominantly white schools,

[23]U. S. Commission on Civil Rights, "Racial Isolation in the Public Schools"; p. 7 (1967).

and that fully 61 percent of black public school pupils in the United States were attending schools which were virtually all (95 to 100 percent) black. As pointed out in the statement portion of our brief, the governmental releases show that federal officials have, insofar as enforcement is concerned, closed their eyes to the racial situation in public schools everywhere in the United States other than the South. It is this distortion of vision which we pray the Court to correct.

It is self-evident, we think, that there can be no such thing as true constitutional government in the United States if the laws of the land mean one thing in Georgia and another in Ohio. Nor can there be true constitutional government if federal officials charged with enforcing law apply it with an uneven hand, construing it to require one result in South Carolina and another in New York. If an all black school or a school lacking any specified number, percentage or quota of a given race, is unconstitutional or ineligible for federal financial assistance in Athens, Georgia, or Charlotte, North Carolina, the same result must obtain in Chicago, Cleveland, Philadelphia and everywhere else. We know that anything less is unacceptable morally. We would like to think anything less is unacceptable politically. We are of the opinion that anything less is unacceptable constitutionally.

CONCLUSION

Pre-*Brown* State-compelled racial separation is dead. We seek not to resurrect it. But is there but one lawful alternative or option available to supplant the corpse? Must public education be placed in a procrustean bed of racial balance which will surely sap its vitality if not its life? Is there any possible justification for the existing

attempt to enforce uniform racial balance on public school pupils or teachers? In *Barnette,* this Court spoke in favor of diversity and multiple options, and against governmentally imposed uniformity. It said:

> "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure towards unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing." *Board of Education v. Barnette,* 319 U.S. 624, 640-41 (1942).

After pointing out that the resulting unanimity in such situations was that of the graveyard, this Court noted the First Amendment to the Constitution was designed to avoid this end by avoiding these beginnings. It is a shame that the striking and prophetic wisdom of the above words has been forgotten.

The government continues to seek higher and higher levels of racial balance in Southern schools, to use the words of *Barnette,* with "ever-increasing severity". We think there is little doubt but that the injury being inflicted upon the children, parents and teachers of Georgia and of the other states victimized by the government's actions renders that described by the Court in *Brown*

v. Board of Education pale by comparison. At issue is nothing less than permanent injury to the hearts and minds of hundreds of thousands if not millions of both black and white children who, lacking the financial means to escape to private schools, will, as the result of the government's actions, be relegated to declining public school systems increasingly bereft of public support, including the vital fiscal support which must be maintained and increased if public schools are to remain viable institutions capable of furnishing meaningful educational opportunity. There is the very real danger of a hardening of class lines, with the children who are forced to attend public schools being condemned to a second class education and consequently second class economic and social opportunity. This is not mere speculation or unfounded fear. As we have shown, the withdrawal process has already started.

The situation becomes even more completely intolerable, as well as divisive nationally, when it is realized that it is only those children, teachers and parents who happen to live in Georgia and the other Southern States who are forced to comply with racial quota and balance requirements. We hope that this Court will make it crystal clear that it meant what it said and said what it meant in *Alexander v. Holmes County Board of Education,* 396 U.S. 19, 20 (1969), about the constitutional mandate being that "no person . . . be effectively excluded from any school because of race or color". We think the decision of the Supreme Court of Georgia is plainly right. We think that decision should be affirmed.

In the event the Court does not agree with us as to the unconstitutionality of the federal government's coercion of racial exclusions (in the form of quota, percentage and

balance requirements), we urge the Court to declare that there is but one Constitution for all citizens and that the same standards applicable to Georgia must be applied throughout the United States.

Respectfully submitted,

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APPENDIX

RACIAL SEGREGATION IN SIX TYPICAL NORTHERN STATES AS SHOWN BY RECENT HEW STATISTICAL RELEASES

OHIO

1. *Cleveland*

The rising tide of racial segregation in the schools of Cleveland between the years 1952 and 1962 is detailed in the 1967 Report of the U. S. Commission on Civil Rights (See Brief, p. 8). By 1962, the city's conversion to a dual system of education based upon race was almost complete. Fully 84.4 percent of Cleveland's black pupils were in majority black schools, with over half of these black pupils (57.4 percent) attending schools which were almost entirely (90 to 100 percent) black. At the other end of the spectrum, 80.2 percent of Cleveland's white students were in almost entirely (90 to 100) percent white schools.

While this already high level of racial separation or segregation might have been thought difficult to increase, Cleveland has accomplished the task. According to HEW's most recent survey the percentage of the city's black pupils attending majority-black schools by the Fall of 1968 had risen from 84.4 percent to 95.2 percent, with the percentage attending almost entirely (90 to 100 percent) black schools being up from the 57.4 percent level to 86 percent. As of the Fall of 1968, 93 percent of Cleveland's white students, on the other hand, were still attending predominantly white schools, with 74.6 percent being enrolled in schools almost entirely (90 to 100 percent) white (the slight drop in this last mentioned figure presumably being attributable to the

overall increase of black pupils to roughly 56 percent of Cleveland's total enrollment). Of the city's 180 schools, 23 are 100 percent black and 78 have more than 80 percent black enrollment. There are 9 *all* white schools and 44 schools having higher than 80 percent white enrollment. Indeed, only 7 of the city's 180 schools approach what might be considered to be racial balance (i.e., a fifty to sixty percent black enrollment).

It would appear that problems of racial imbalance as to teaching staff have been largely avoided in Cleveland by the simple expedient of not employing any great number of black teachers. In sharp contrast to the roughly 56 percent black pupil enrollment only 28.9 percent of the teaching staff is black. (In a similar situation, the Atlanta, Georgia, public school system employs a teaching staff composed of 57 percent black teachers). HEW's figures show that black teachers are by and large assigned to black schools, while instruction in white schools is mostly by white teachers (Atlanta is under court order to effect racial balance in each of its schools based upon the system-wide black-white teacher ratio). Neither the Justice Department nor HEW appears to have shown any interest in disestablishing the dual school system of Cleveland, Ohio.

2. *Hamilton*

Racial segregation in the public schools of Ohio is not in the least confined to large urban areas as Cleveland or districts having a predominantly black enrollment. In Hamilton, Ohio, black pupils constitute only 10 percent of the school district's 15,463 students. One might well think that the mere 1,554 black students could be assigned so as to avoid any racial concentration. Such

is not the case. According to HEW's latest statistics, almost half of the district's black pupils (i.e., 673) have been placed in the Harrison school, which as a result of the racial concentration is 82.5 percent black. All but 4 of the district's 23 schools have black enrollments of less than 5 percent. Respecting faculty, only 17 of the district's teachers (less than 3 percent) are black. Nine of the 17 teachers have been assigned to the racially segregated Harrison school.

3. *Toledo*

According to the recent HEW survey, Toledo operated 76 schools during the Fall of 1968 and had an overall black enrollment of about 27 percent. Over half of the city's black students have been assigned to schools having black enrollments in excess of 90 percent and fully 77.3 percent of the black pupils are in predominantly black schools. The survey shows that the school district's black teachers are largely assigned to the segregated black schools.

4. *Columbus*

The survey indicated that Columbus, Ohio, operated 168 schools and had an overall black enrollment of about 26 percent. Forty percent of these students are in 90 to 100 percent black enrollment schools while fully 71.2 percent are in majority black enrollment schools. HEW figures show a pattern of faculty assignment according to race.

5. *Dayton*

Dayton too operates an almost completely segregated school system for its black pupils (who constitute 38.3

percent of Dayton's total public school enrollment). A startling 80.3 percent of Dayton's black pupils are assigned to 90 to 100 percent black enrollment schools while 82.2 percent of its white pupils are permitted to attend 90 to 100 percent white enrollment schools. Again HEW figures show that black teachers are assigned mostly to black schools. Of Dayton's 69 public schools, 20 are more than 90 percent black while 38 are more than 90 percent white.

Summing up the situation in Ohio, it would appear that whenever a school district in that State has a sufficient number of black pupils to make their concentration in a "black" school feasible, this is what is done. Racially segregated school districts covered by the recent HEW survey include Canton, Youngstown, Cincinnati, Springfield, Shaker Heights and Akron. HEW's "Directory, Public Elementary and Secondary Schools in Large School Districts (with enrollment and instructional staff by race, Fall 1967)" shows the same pattern in many more Ohio school districts. Until the '40s and '50s various Ohio cities openly maintained separate schools for black students in which instruction was ordinarily provided by an also segregated teaching staff.[1] Originally erected upon laws requiring or permitting it, racial segregation in the public schools of Ohio has been perpetuated and increased in the post *Brown* period to an extent which can scarcely be said to be unnoticed. Yet for all of the talk about the necessity of dismantling dual school systems, federal officials continue to look the other way when in Ohio. They continue to look only to the South.

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[1]See, U. S. Commission on Civil Rights, *Racial Isolation in the Public Schools*, p. 43.

ILLINOIS

1. *Chicago*

We have previously noted the growth of racial segregation in the public schools of Chicago to where by the 1965-66 school year fully 89.2 percent of the city's black pupils were enrolled in almost entirely (90 to 100 percent) black schools, while at the same time 88.8 percent of the city's white pupils were attending virtually all (90 to 100 percent) white schools. While HEW's latest figures show that this level of almost complete apartheid has tapered off ever so slightly, racial segregation continues to pervade the Chicago schools. The newest figures show that 86.1 percent of Chicago's black pupils (who constitute 52.9 percent of the total enrollment) continue to attend schools virtually all (90 to 100 percent) black (a drop of 3.1 percent since the 1965-66 school year). Significantly, the bulk of these students (i.e., 52.1 percent) attend schools which have a black enrollment in excess of 99 percent. Of the city's 610 schools, 42 are all black and 277 more than 80 percent black. Fourteen are all white and 207 are more than 80 percent white. Of the 610 schools, only 22 approach racial balance (which in view of the roughly fifty-fifty racial composition might be considered to be in the 45 to 55 percent black enrollment range). HEW's most recent survey shows the same general pattern of black teachers being assigned mostly to the city's segregated black schools.

2. *Harvey Public School District*

According to HEW's recent survey, the Harvey Public School District, as of the Fall of 1968, operated 8 schools with a total enrollment of 3,573 pupils of whom 879 (24.6 percent) were black. As in the case of Hamilton,

Ohio, one would think that such a system could easily dismantle its dual school system. As in the case of Hamilton, Ohio, it has not. It has assigned approximately half (i.e., 427) of its black pupils to the *all* black Riley school for a *totally* segregated education. An additional 286 black students are assigned to the 55 percent black Emerson school, 135 to the 26.3 percent black Lowell-Longfellow school, with the remaining 31 black pupils scattered as tokens among the 5 white schools so that none of the latter has a black enrollment in excess of 5.3 percent. Again, it is seen that black teachers are for the most part assigned to the segregated black schools. The Harvey Public School District has placed 15 of its 45 black teachers in the all-black Riley school. Thirteen are in Emerson, 5 in Lowell-Longfellow and the remaining 12 scattered in the white schools.

3. *Peoria*

The HEW survey shows similar racial concentration in Peoria, Illinois. Black enrollment is 17.7 percent of the total number of pupils in the city's 39 schools. Yet over half of these black pupils have been assigned to 7 schools which range from 50.3 to 95.7 percent black. Fully 19 schools are permitted to operate as almost entirely (90 to 100 percent) white schools. The survey once again shows a pattern of avoiding faculty desegregation problems by not employing any significant number of black teachers (only 4.7 percent in Peoria), and assigning those black teachers who are employed primarily to the black schools.

4. *East St. Louis*

East St. Louis reflects the same pattern of racial segregation, only this time in a predominantly black school

district (71.6 percent of the total enrollment is black). Fully 71.9 percent of the white students are permitted to attend predominantly white schools (with 4 schools being all white). Fully 24 of the district's 41 schools have a black enrollment in excess of 95 percent. As a result of the racial concentration, 76 percent of all black pupils attend virtually all (90 to 100 percent) black schools.

Summing up the situation in Illinois, it is seen that things are about the same here as they are in Ohio. Where there is a substantial number of black pupils, they are concentrated in predominantly black schools. In addition to the school districts which we have discussed, the recent HEW survey shows racially segregated school systems in Chicago Heights, Posen-Robbins, Waukegan, Springfield, Joliet and Rockford as well as other areas. HEW's "Directory, Public Elementary and Secondary Education in Large School Districts (with enrollment and instructional staff by race, Fall 1967)" shows the same pattern of racial segregation throughout the State. As in Ohio, racial segregation was frequently erected with official sanction in Illinois. As recently as 1952, at least seven counties of the State officially maintained separate schools for black pupils and openly assigned teachers and principals on a racial basis. See, U. S. Commission on Civil Rights, *Racial Isolation in the Public Schools*, p. 43. Federal officials have taken no steps to dismantle the dual school systems so prevalent in Illinois.

PENNSYLVANIA

1. *Philadelphia*

The 1967 Report of the United States Commission on Civil Rights reflected the increase of racial segregation in the public schools of Philadelphia between 1950

and 1965. It indicated that by 1965, 90.2 percent of the city's black students were in predominantly black schools with fully 72 percent being enrolled in virtually all (90 to 100 percent) black schools.

HEW's more recent survey shows that while the number of black pupils in virtually all (90 to 100 percent) black schools had decreased by about 3 percent (i.e., to 67.1 percent), over ninety percent remained in predominantly black schools. At the same time, the bulk (82.4 percent) of white students were still attending majority-white schools with over half (58.8 percent) being enrolled in virtually all (90 to 100 percent) white schools. In a system where black pupils constitute 58.8 percent of the total enrollment, 66 of the 278 schools had a black enrollment of over 99 percent while 35 schools had less than a 3 percent black enrollment. The familiar pattern of black teachers being more heavily concentrated in the black schools is also indicated by the recent survey.

2. *Pittsburgh*

Pittsburgh too operates a dual system of education for black and white pupils. While the black enrollment in Pittsburgh is but 39.2 percent of the total number of pupils in the city's schools, fully 78.6 percent are assigned to majority-black schools and over half (52.5 percent) are assigned to virtually all (90 to 100 percent) black schools. With respect to Pittsburgh's white students, 91.2 percent attend majority-white schools and almost half (47.6 percent) are assigned to virtually all (90 to 100 percent) white schools. Of the city's 113 schools only 4 approach racial balance (which based upon the system-wide racial composition might be said to be between 35 and 45 percent black enrollment). Again, black

teachers, if and when employed at all, are apt to be assigned to black schools.

3. *Penn Hills Township*

Penn Hills Township has approximately 14,128 pupils in its 16 schools. Only 5.7 percent (809) are black. Again, one would suppose that in such a system racial concentration could be avoided with little difficulty. Again, the government's own statistics show that anyone having such a thought would be in error. Almost a third of the black pupils (246) have been assigned to the 100 percent black Lincoln Park Elementary School. The remainder of black pupils are scattered among the 15 white schools—all of which have a white enrollment of more than 90 percent. Only 5 of the district's 581 teachers are black.

4. *McKeesport Area School District*

According to the HEW survey, this school district had an enrollment of 10,560 during the Fall of 1968, of which 1,336 (12.7 percent) were black. Over half of these black pupils were assigned to two schools, one being 83.5 percent black and the other 38.0 percent black. The remaining black pupils were scattered among fifteen of the remaining 21 schools of the district (6 schools being 100 percent white). Five of the seven black teachers employed by the school district were assigned to the predominantly black school.

The summing up of the situation in Pennsylvania leads one to the same conclusions which were made respecting Ohio and Illinois. The HEW survey of the Fall of 1968 showed a pattern of racial discrimination in such cities as Harrisburg, Chester City, Norristown, Wilkinsburg and Darby Township as well as in the districts we have dis-

cussed. HEW's "Directory, Public Elementary and Secondary Education in Large School Districts (with enrollment and instructional staff by race, Fall 1967)" clearly shows the same statewide pattern of racial segregation—provided an adequate number of black pupils exists within a school district so as to make segregation feasible—as is seen in Ohio and Illinois. Although black pupils constitute but 11.7 percent of Pennsylvania's public school students, fully 77.5 percent of the black pupils are concentrated in majority black schools. This figure is all the more significant when it is considered that Pennsylvania has a vast number of school districts where the black pupils are too small in number to practically permit racial isolation in any particular school. Again, it may be wondered why federal officials are so timid in school districts located outside the South.

NEW YORK

1. *New York City*

The New York City Public Schools had over a million students during the Fall of 1968, of which 334,841 (31.5 percent) were black and 467,365 (43.9 percent) were white (the HEW survey giving the separate breakdown for the substantial Spanish-American minority). The survey indicated that 80.3 percent of New York's black pupils were enrolled in schools which were predominantly "minority" schools and that over half of the black pupils attended schools which were virtually all (90 to 100 percent) minority. At the same time, fully 70.1 percent of the white students were attending predominantly white schools.

2. *Buffalo*

Buffalo operates 101 schools for its 72,115 students.

According to the HEW survey, black enrollment constituted 36.6 percent of the total in the Fall of 1968. As of that time, fully 62.5 percent of the city's black students were assigned to virtually all (90 to 100 percent) black schools. Of the white students, 98.4 percent attended predominantly white schools and 31.8 percent attended virtually all (90 to 100 percent) white schools. Twenty-three of the district's 101 schools were at least 90 percent black, while fifty-three were at least 80 percent white. HEW's statistics again reflect a pattern of black teachers (10.4 percent of the total) being concentrated in the district's black schools.

3. *Newburgh*

The same pattern of racial separation, isolation and segregation is seen in Newburgh. While black pupils constitute only 23 percent of the total enrollment, over half (57.4 percent) are in majority-black enrollment schools, with 33.2 percent in virtually all (90 to 100 percent) black schools.

Although the degree of racial segregation does appear to be slightly lower in New York than in Ohio, Illinois and Pennsylvania, it is by no means absent or insignificant. In addition to the systems mentioned, the HEW survey reflected varying degrees of racial segregation in the schools of Albany, Lackawanna, Niagara Falls, Niagara-Wheatfield, Utica and Monticello. On a statewide basis, black pupils constitute only 14.1 percent of the enrollment, yet 67.7 percent of New York's black pupils find themselves in predominantly black schools while fully 35.8 percent are in schools over 95 percent black.

CALIFORNIA

1. *Los Angeles*

According to the HEW survey, the public schools of Los Angeles, as of the Fall of 1968, had a "white" enrollment of 53.7 percent, a black enrollment of 22.6 percent, and a Spanish-American enrollment of 20 percent. The survey shows a remarkably high level of racial segregation. Fully 95 percent of the city's black pupils were attending schools which were over half minority enrollment while 83 percent were attending virtually all (90 to 100 percent) minority enrollment schools. At the same time, 92.3 percent of the city's white pupils were attending predominantly white schools and over half of the white students [53.6 percent were assigned to virtually all (90 to 100 percent)] white schools. Once again the HEW survey reflects the fact that black teachers are concentrated in minority schools.

2. *San Diego*

San Diego similarly reflects high level of racial segregation in its 155 schools. Black students, who constitute only 11.6 percent of the total enrollment, are segregated to such an extent that over half (54.6 percent) are in almost entirely (90 to 100 percent) minority schools while 74.8 percent are in predominantly minority schools. At the same time, the HEW survey shows that over half (54.8 percent) of the white students are in 90 to 100 percent white schools with 97 percent of the white students being in majority-white schools. The recent HEW survey once again reflects the pattern of black teachers being assigned primarily to black schools.

3. *Sequoia Union High School District*

The HEW survey shows that Sequoia Union High

School District operates 7 high schools with a total enrollment of 12,343 students of whom 1,351 (10.9 percent) are black. The majority of these black students (64.4 percent) have been assigned to a particular school (Ravenswood High) which is over 90 percent black. The remainder are scattered in the six white schools. As a result, 99.3 percent of all white pupils are in majority-white schools and 63.9 percent of the white pupils are in schools virtually all (90 to 100 percent) white. The system employs 580 teachers of whom 17 (2.9 percent) are black. Eight of the seventeen black teachers are assigned to the black school (i.e., Ravenswood).

4. *Fresno*

Fresno has 58,234 pupils of whom 5,251 (9 percent) are black. Eighty-four percent of the black pupils are in predominantly minority schools and 76.6 percent are in virtually all (90 to 100 percent) minority schools. Ninety-three percent of the white pupils are in predominantly white schools with 39.8 percent of such white pupils being in virtually all (90 to 100 percent) white schools.

5. *Compton City Elementary*

The HEW survey shows that this district has 16,407 pupils of whom 71.5 percent (11,725) are black. Of its 20 schools, 3 are 100 percent black and 12 are in excess of 90 percent black. The bulk of the white pupils in the system have been permitted to escape to 3 predominantly white schools. As a result, while 95.9 percent of black pupils are in majority-black schools, with fully 90.3 percent in virtually all (90 to 100 percent) minority schools, 77.7 percent of the white pupils attend predominantly white schools.

6. *Monrovia Unified School District*

This system has 7,118 students in its 10 schools, of whom 911 (12.8 percent) are black. Three hundred and thirty-four (36.6 percent) of the black pupils have been assigned to the all-black Huntington Elementary School, the rest being scattered among the 9 other schools. As a result, all white children attend majority-white schools with approximately 30 percent of the white pupils attending schools having in excess of a 90 percent white enrollment. The district employs 277 teachers of whom 14 (5.1 percent) are black. Five of the 14 black teachers are assigned to the all-black Huntington Elementary School.

Of the California school districts covered by the HEW survey, it did appear that one school district at least approached what might be considered to be an integrated system. The Berkeley Unified School District had 16,204 students during the Fall of 1968, with 6,917 (42.7 percent) being black students. Of its 33 schools, only one special school was 100 percent black and only two were more than 85 percent white. The remaining 30 schools ranged from 21.7 to a 64.1 percent black enrollment. In general, however, the HEW survey established that racial segregation in the public schools of California was as pronounced as it had been found to be in Ohio, Illinois and Pennsylvania.

NEW JERSEY

1. *Newark*

The HEW survey indicates that as of the Fall of 1968 Newark had 75,960 pupils of whom 54,757 (72.5 percent) were black. Ninety-eight percent of these black

pupils are in majority black schools with 86 percent attending virtually all (90 to 100 percent) black schools. A majority of the white pupils (59.1 percent) are permitted to escape to the district's 10 predominantly white schools.

2. *Atlantic City*

In the Fall of 1968, Atlantic City had 8,605 students in its 14 public schools. Black pupils, accounting for 62.3 percent of the total, were assigned largely to the 8 black schools so that over half of the district's black pupils were attending almost all (90 to 100 percent) black schools. At the same time, 84.8 percent of the white pupils were being permitted to attend the 5 predominantly white schools. Five of the 14 schools were 100 percent black and three other around the 70 percent level respecting black enrollment. The HEW survey once again reflected the pattern of concentrating the district's black teachers in its black schools.

3. *Camden City*

Camden is another example of a majority black enrollment district (58.9 percent) in which the bulk of the white minority (81 percent) is permitted to attend predominantly white schools. As a result, almost 60 percent of the black pupils attend virtually all (90 to 100 percent) black schools.

4. *Jersey City*

The HEW survey indicated that Jersey City operated 36 schools in the Fall of 1968 for 37,083 students. Forty-three percent of the total were black pupils, yet almost half (49.9 percent) of these black students were assigned to almost all (90 to 100 percent) black schools

with 81.1 percent being assigned to majority-black schools. Once again, the survey reflected a concentration of black teachers (12.8 percent of the total faculty of the district) in the black schools.

5. *Township of Union*

According to the HEW survey, Union had 8,719 students in the 10 schools it operated during the Fall of 1968. Of this total, 986 (11.3 percent) were black. Three hundred and seventy of these black students (37.5 percent) were assigned to the 94.9 percent black Jefferson school. One other school, Burnet Junior High, was 18.8 percent black (221 black students) while each of the remaining 8 schools was over 90 percent white. As a result, 99.7 percent of the white pupils attended predominantly white schools, with 87.2 percent attending virtually all (90 to 100 percent) white schools. Of the district's 412 teachers, 16 (3.9 percent) were black. Ten of these 16 black teachers were assigned to Jefferson and Burnet.

Summing up the public schools of New Jersey, we see the same picture of pervasive racial segregation as is reflected by the HEW survey for Northern school systems generally. While the percentage of black public school pupils in New Jersey constitute only 14.9 percent of the total, the HEW survey shows that 66.1 percent of these black pupils are in predominantly black schools, with an amazing 32.8 percent being enrolled in schools which are over 95 percent black.

We have examined a few of the dual school systems of Ohio, Illinois, Pennsylvania, New York, California and New Jersey. The school districts mentioned are neither the most nor the least racially segregated districts of the

Northern and Western States. Taking HEW's own recent survey, we could add hundreds of pages going into the high level of racial segregation in such cities as Detroit (Michigan), Baltimore (Maryland), Milwaukee (Wisconsin), St. Louis (Missouri), Kansas City (Missouri), Seattle (Washington), Portland (Oregon), Las Vegas (Nevada), Albuquerque (New Mexico), Omaha (Nebraska), Flint (Michigan), and Gary (Indiana) to mention but a few. The point is that the federal government's own survey shows a very high degree of nation-wide racial separation (with 61 percent of all black pupils in virtually all black schools and only 23.4 percent in predominantly white schools), and it is eminently reasonable to complain when the federal government's educationally disruptive and destructive attack upon this pervasive racial separation throughout the Nation is limited to one geographic region of the Nation as a scapegoat.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 420

CHARLES McDANIEL, et al.,

Petitioners,

VS:

JOSEPH BARRESI, JR., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF OF RESPONDENTS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 420

CHARLES McDANIEL, et al.,

Petitioners,

VS:

JOSEPH BARRESI, JR., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF OF RESPONDENTS

QUESTIONS PRESENTED

(1) Whether the Constitution requires that objecting Negro and white children be assigned to public schools solely on the basis of race in order to achieve a pre-determined racial balance?

(2) Whether the assignment of children to public schools solely on the basis of race to achieve a pre-determined racial balance, where such assignment was made pursuant to compulsion of the Department of Health, Education and Welfare in pending enforcement proceedings under Title 6 of the Civil Rights Act of 1964, is contrary to Sections 401 and 407a of said Act, 42 USCA §§ 2000c, 2000c-6, the Elementary and Secondary Education Act of 1965 as amended, 20 USCA 242, and Sections 409 and 410 of the 1968 Appropriations Act for the Department of Health, Education and Welfare, PL 90-557, Title IV, § 18?

(3) Whether a plan of desegregation which requires selected Negro children to be assigned and bussed out of their attendance zones to schools located outside their neighborhoods, while white children are permitted to attend schools within their attendance zones, denies to such Negro children the equal protection and due process of law guaranteed by the Fourteenth Amendment?

(4) Whether the neighborhood plan of desegregation adopted by petitioners on April 29, 1969, and later rejected by the United States Department of Health, Education and Welfare, was a constitutional plan of desegregation?

STATEMENT

The Statement in the brief of Petitioners is correct, but requires some supplementation to facilitate understanding.

In essence, these proceedings began with objections[1] filed by parents in three neighborhoods of Clarke County, Georgia, to a new plan of school desegregation adopted by the Clarke County Board of Education on July 30, 1969 (A. 203), in response to demands by the United States Department of Health, Education and Welfare in pending enforcement proceedings under Title 6 of the Civil Rights Act of 1964 (A. 97, 223).

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1. Under Georgia law, as a condition precedent to judicial review of any action of a local board of education, administrative remedies must first be pursued by filing a "Motion for Reconsideration" with the local board, following which a quasi-judicial type hearing is held before the local board, followed by an appeal to the State Board of Education. See Ga. Code §32-910, and Rules and Regulations of the State of Georgia, Vol. 4, §160-1-.18.

The objections relate only to the elementary schools, and no question is presented here as to the junior high and high schools.[2]

The respondents originally consisted of parents residing in three communities in Clarke County: (1) University Heights, an all-white community in the southeastern part of the county (A. 138, 207); (2) Rock Springs Homes, located in the south central part of the county (A. 17, 26), wherein reside three Negro plaintiffs, Mrs. Otis Sims (A. 136), Mrs. Eddie Cross and Miss Emma Young (A. 154); and (3) Northwest Clarke, consisting of four smaller communities known as Camelot, Oconee Heights, Tallassee Road and Westgate Park (A. 3, 63), and which is occuppied by one Negro respondent, Mrs. Magnolia Faust (A. 68) and a number of white respondents. The University Heights and Rock Springs Homes parents were named as plaintiffs in one action (A. 16) and the Northwest Clarke parents in the other (A. 2). Following the decision of Clarke Superior Court, only the Negro plaintiffs in the Rock Springs Homes case, and the Northwest Clarke parents prosecuted appeal to the Supreme Court of Georgia.

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2. During 1969-70, the 3 junior high schools were operated on a feeder plan, and the two high schools in the system were operated on a freedom of choice plan (A. 168). During the current school year, the 3 junior high schools continue to be operated on a feeder plan (A. 169) and the two high schools are paired, with grades 11-12 attending the prior white school (Athens High) and grade 10 attending the former Negro High school (Burney Harris). A proposed new high school has not yet been constructed. The closing of the previously all-Negro high school and its conversion to a school for grade 9 only has been the subject of demonstrations and protests by members of the Negro community earlier this year.

Consequently, the question as to the University Heights parents is not in issue here.

All of the respondents contended below that the assignment of their children to schools solely on the basis of race to achieve a racial balance was both illegal and unconstitutional, and in addition, the three Negro parents residing in Rock Springs Home attack the assignment of their children out of their attendance zone (West Broad) to Barrow on the ground that this constitutes a discrimination as against them in that only Negro children are being assigned out of their zones.

SUMMARY OF ARGUMENT

(I) The assignment of children to public schools solely on the basis of race is not required by the Constitution for any reason.

(a) When Brown I was before the Court, statements of counsel in the briefs as well as in oral argument reflect the clear understanding that the abolition of discrimination was the objective being sought and not an affirmative requirement of integration.

(b) The language of Brown I and II requires the conclusion referred to above, as well as the overwhelming judicial construction placed upon Brown during the first decade thereafter.

(c) Assignment of pupils by race to achieve racial balance or desegregation is not required. Racial classifications are inherently suspect. Proportional racial distribution is not required. White and Negro pupils objecting to such assignments are equally entitled to complain of discrimination. Recent decisions of this Court do not require a contrary result. The language of the Fourteenth Amendment is negative and not positive, and was designed as a shield and not as a sword. Several aspects of the affirmative duty doctrine are not disputed, and are distinguished. For the Court to now hold that the Constitution requires integration rather than prohibiting state - imposed segregation, would necessarily require acceptance of the sociological theory that the education of minority students is retarded by racial imbalance. This doctrine is an impermissible one because (1) It is predicated on a theory of white supremacy (2) It would impinge upon the liberty of white children and parents by compelling them to sacrifice their freedom in order to better the condition of others, and such a choice is beyond the

power of government (3) It would place the Court in an impossible predicament, in holding that racial isolation was unconstitutional, when statistics demonstrate conclusively that in large areas of the country a remedy is impossible of achievement; and it also would require the Court to adjudicate in an area bereft of judicially-manageable standards.

(d) Racial assignments can not be justified as a means of remedying the effects of past discrimination, or under the "disestablishment" precedents. In both of these instances, the rights of third parties were not involved. Here, both Negro and white parents are present whose rights are violated by their children being assigned by race.

(2) Assignment of pupils to overcome racial imbalance is contrary to the Civil Rights Act of 1964. The prohibition of the latter is not limited to states where segregation had not been required by law, for the legislative history discloses that the case principally relied upon involved a state where segregation had been mandated by law as late as 1949, and under a decision of this Court, segregated education is presumed to have continuing effect for over 60 years. Since petitioners'

plan here was adopted under compulsion of HEW in pending enforcement proceedings, such "federal action" is present as to involve a violation of these statutes.

(3) Aside from all other questions, the plan of petitioners here is unconstitutional because it discriminates against the Negro respondents by assigning their children and other Negro children outside their attendance areas while white students are not subjected to such burdens.

(4) In any event, the plan of desegregation adopted by petitioners was properly enjoined for the reason that the plan previously adopted in April was a valid one which HEW was without authority to disapprove.

ARGUMENT

(1) The Assignment of Children to Public Schools Solely On The Basis Of Race Is Not Required For Any Reason.

The facts in this case are not in dispute. The Clarke County Board of Education concedes that the plan of desegregation for its

elementary schools was based on race in order to comply with demands of the United States Department of Health, Education and Welfare in pending Title 6 enforcement proceedings (A. 97, 223). This was accomplished in several ways:

First, relying upon the fact that the system was approximately 33% Negro (A. 37), the Board adopted a policy under which each elementary school would be constituted so as to have not less than 20 nor more than 40% Negro enrollment, except with respect to West Broad and East Athens schools, which were designed to exceed 40% Negro enrollment as a concession to Negro board member Jones (A. 82, 97, 113, 119).

Second, zone lines were deliberately gerrymandered so as to create distorted, non-compact zones which would include both inner-city Negro students and suburban whites (A. 42, 68, 97, 113).

Third, being unable to obtain enough Negro students to achieve the 20-40% Negro enrollment in the outlying schools, the

Board arbitrarily selected five "pockets" of Negro students in four of the geographical zones within the City for assignment to outlying schools outside their respective zones. These pockets were selected without regard to any ascertainable criteria, other than the fact that a particular group would be selected from a given area containing the number of pupils needed at a given outlying school (A. 82, 114). All of the Negro pupils in the five pockets, who resided within walking distances of the schools in their zones, were bussed to schools outside their zones, except those in the West Broad zone, who are required to walk approximately 1 1/2 miles to the Barrow School (A. 43, 48, 115).

It is the position of respondents that the assignment of pupils solely on the basis of race, whether to achieve a pre-determined racial balance or otherwise, is not required by the Constitution, but is itself unconstitutional; that the rights of both white and Negro students so assigned are thereby violated; that such assignments can not be justified either as a means of disestablishing a dual system or as eradicating the effects of past discrimination; and that no decision of this Court has held to the contrary.

(a) The Original Understanding Of Brown

During oral arguments in 1952 which preceded this Court's decision in Brown v. Board of Education, 349 U.S. 294 (1954), Mr. Thurgood Marshall, now a member of this Court, and who was then of counsel for the plaintiffs, stated in a colloquy with Mr. Justice Frankfurter, that the plaintiffs were merely seeking an end to school assignments based upon race, and that a decision in their favor would not confer a right upon any pupil to demand that he be permitted to attend school with pupils of the opposite race. The following transpired:

> "Mr. Marshall: * * * The only thing that we ask for is that the state-imposed racial segregation be taken off, and to leave the county school board, the county people, the district people, to work out their own solution of the problem to assign children on any reasonable basis they want to assign them on.
>
> "Justice Frankfurter: You mean, if we reverse, it will not entitle every mother to have her child go to a non-segregated school in Clarendon County?
>
> "Mr. Marshall: No, sir.
>
> "Justice Frankfurter: What will it do? Would you mind spelling this out? What would happen?
>
> "Mr. Marshall: Yes, sir. The school board, I assume would find some other method of distributing the children, a recognizable method, by drawing district lines.

* * * * *

"Justice Frankfurter: It would be more important information, in my mind, to have you spell out in concrete what would happen if this Court reverses and the case goes back to the District Court for the entry of a decree.

"Mr. Marshall: I think, sir, that the decree would be entered which would enjoin the school officials from, one, enforcing the statute; two, from segregating on the basis of race or color. Then I think what ever district lines they draw, if it can be shown that those lines are drawn on the basis of race or color, then I think they would violate the injunction. If the lines are drawn on a natural basis, without regard to race or color, then I think that nobody would have any complaint.

"For example, the colored child that is over here in this school would not be able to go to that school. But the only thing that would come down would be the decision that whatever rule you set in, if you set in, it shall not be on race, either actually or by any other way. It would violate the injunction, in my opinion.

"Justice Frankfurter: There is a thing that I do not understand. Why would not that inevitably involve -- unless you have Negro ghettoes, or if you find that language offensive, unless you have concentrations of Negroes, so that only Negro children would go there, and there would be no white children mixed with them, or vice versa -- why would it not involve Negro children saying, 'I want to go to this school instead of that school'?

"Mr. Marshall: That is the interesting thing in this procedure. They could move over into the district, if necessary. Even if you get stuck in one district, there is always an out, as long as this statute is gone."

See Transcript of Oral Argument, Brown v. Board of Education, in the Library of this Court, Ward and Paul, Reporters, arguments of December 9, 1952, pp. 21-30.

See also, Alexander M. Bickell, The Supreme Court And The Idea Of Progress, p. 117(1970), and 21 U.S. Law Week 3164 (1952), where the same colloquy appears.

In a brief filed in this Court in 1952 by Mr. Arthur J. Goldberg, later a member of this Court, on behalf of the Congress of Industrial Organizations as Amicus Curiae, it was said:

> "There are objections to segregation which are particularly applicable to the public schools. These general concepts- that permissive separation is not the same as compulsory segregation and that the constitutional evil in all these cases is not the separation of the races but the denial to the individual of his right to choose to be separate or not - may, perhaps, be usefully applied in dealing with the particular kind of segregation problem here presented, viz: public school education---." (Brief, p. 9)
>
> * * * * * * * *
>
> "We do not mean, be it understood, that there is anything in the 14th Amendment which makes it mandatory that pupils be given a choice of school. We only mean that the elimination of compulsory segregation is not the same thing as compulsory attendance of whites at Negro schools, or Negroes at white schools, because the states can, wherever they now compel separation, offer separation on a voluntary basis. Even compulsory attendance at particular schools based on residential districting rests ultimately on the voluntary choice of residence. Negroes and whites would no more be compelled to attend the same schools under such regulations than were Negroes and whites compelled to live in the same neighborhood when compulsory residential segregation was declared invalid in Buchanan v. Warley, 245 U.S. 60." (Id., p. 10)

In a brief filed in Court on May 6, 1955, by Mr. Thurgood Marshall on reargument, the following appears in the "Conclusion":

> "The Negro children before the Court in these cases are entitled to public education on a non-segregated basis. The only way the relief can be meaningful to them is to abolish the policy of using race as a criterion for assignment of students. Thus, the only effective decree would be one which will enjoin the use of race in the assignment of any pupils in the school districts involved." (Brief, pp. 10-11).

In a brief filed by the United States as amicus curiae on reargument on the question of relief, it was said that "The decisive inquiry is whether race or color has been entirely eliminated as a criterion in the admission of pupils to public schools." (p. 26).

Mr. Jack Greenberg, counsel for the organization conducting most of the litigation in school cases, had this to say in 1959 as to the effect of Brown:

> "Moreover, the jury discrimination precedents may be recalled: Bias may be presumed from a consistently segregated result; a token number of Negroes may be legally equivalent to none. If, however, in education there were complete freedom of choice, or geographic zoning, or any other nonracial standard, and all Negroes still ended up in certain schools, there would seem to be no constitutional objection." Greenberg, Race Relations and American Law, pp. 239-40 (1959)

(b) The Holding of Brown And Its Contemporary Construction

In Brown v. Board of Education, 347 U.S. 483, 495 (1954), this Court held that ". . . [T]he plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." In the context of the opinion, it is clear that the Court was referring to state enforced segregation, for reference previously had been made to the fact that "Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children. . . " (Id., p. 494), and additional support was derived from a finding in the Delaware case relating to the effect of "State-imposed segregation" (f.n. 10). Upon reargument, the parties were directed to give consideration to the question:

> ". . . Would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice. . ." (Id., p. 495, f.n. 13).

This language clearly refutes any assumption by this Court that state-mandated integration was to replace state-enforced segregation, for such necessarily follows from a recognition of "normal geographical districting" as a remedy.

In Brown II, 349 U.S. 294, 300 (1955), the Court declared that lower courts "may consider problems arising from. . . revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non racial basis." Reference was then made to a remand of the cases to the lower courts "to take such proceedings and enter such orders and decrees. . . as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."

In one of the earliest appearances of the cases upon remand, the three-judge court in the South Carolina case, Briggs v. Elliott, 132 F. Supp. 776 (D.C. S.C. 1955) declared, in a holding which has been widely quoted:

> "Having said this, it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution

or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals."

In the Brown case itself upon remand, the Kansas court declared:

"Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.

"If it is a fact, as we understand it is, with respect to Buchanan School that the district is inhabited entirely by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live." Brown v. Board of Education of Topeka, 139 F. Supp. 468 (D.C. Kan. 1955).

In Evans v. Buchanan, 207 F. Supp. 820 (D.C. Del. 1962), the Court held:

"The court holds that the States do not have an affirmative, constitutional duty to provide an integrated education. The pertinent portion of the Fourteenth Amendment of the United States Constitution reads, 'nor [shall any State] deny any person within its jurisdiction the equal protection of the laws.' This clause does not contemplate compelling action; rather, it is a prohibition preventing the States from applying their laws unequally.

"When interpreting the equal protection clause in the Brown case the Supreme Court held only that a State may not deny any person on account of race the right to attend a public school. Chief Justice Warren, speaking for the court said, 'To separate them [Negroes] from others * * * solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.' (Emphasis supplied.) The clear implication of this statement is that if races are separated because of geographic or transportation considerations or other similar criteria, it is no concern of the Federal Constitution. Thus, discrimination is forbidden but integration is not compelled."

In a more recent case, a district court in Ohio declared:

"In this cause of action the plaintiffs are requesting the Court to do what the Constitution forbids, that is, to recognize their color and to order them admitted to a school because of that color. Plaintiffs have a constitutional right not to be objects of racial discrimination, and they can vindicate that right in an action before this Court, but they do not have a constitutional right to attend or to refrain from attending a particular school on the basis of racial considerations when there has been no actual discrimination against them. The law is color-blind and, in cases such as this, that principle, which was designed to insure equal protection to all citizens, is both a shield and a sword. While protecting them in their right to be free from racial discrimination, it at the same time denies them the right to consideration on a racial basis when there has been no discrimination." Lynch v. Kenston School District, 229 F. Supp. 740, 744 (D.C. Ohio 1964).

The principle of these cases, that the Constitution does not require integration, was reiterated in almost every case to consider the question in the first decade after Brown.[1]

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1. Allen v. County School Board of Prince Edward County, 249 F2d 462 (C.A. 4th 1957); Aaron v. Cooper, 169 F. Supp. 325, 336 (D.C. Ark. 1959); Aaron v. Tucker, 186 F. Supp. 913 (D.C. Ark. 1960); Borders v. Rippy, 247 F2d 268, 271 (C.A. 5th 1957); Boson v. Rippy, 285 F2d 43 (C.A. 5th 1960); Holland v. Board of Public Instruction, 258 F2d 730 (C.A. 5th 1958); Dove v. Parham, 181 F. Supp. 504 (D.C. Ark. 1960); Kelley v. Board of Education of Nashville, 270 F2d 209 (C.A. 6th 1959), cert. den. 361 U.S. 924; McCoy v. Greensboro Board of Education, 179 F. Supp. 745 (D.C. N.C. 1960), rev'd. on other grounds, 283 F2d 667 (C.A. 4th 1960); Calhoun v. Latimer, 188 F. Supp. 401 (D.C. Ga. 1959); Wheeler v. Durham City Board of Education, 196 F. Supp. 72 (D.C. N.C. 1961); Jeffers v. Whitley, 197 F. Supp. 84 (D.C. N.C. 1961), rev'd. on other grounds, 309 F2d 621 (C.A. 4th 1962); Thompson v. Arlington School District, 204 F. Supp. 620 (D.C. Va. 1962); Jackson v. School Board of Lynchburg, 203 F. Supp. 701 (D.C. Va. 1962); Vick v. County School Board of Obion County, 205 F. Supp. 436 (D.C. Tenn. 1962); Bell v. School City of Gary, 213 F. Supp. 819 (D.C. Ind. 1963) aff'd. 324 F2d 209 (C.A. 7th 1963), cert. den. 377 U.S. 924 (1964); Blakeney v. Fairfax County School Board, 231 F. Supp. 1006 (D.C. Va. 1964); Davis v. East Baton Rouge Parish School Board, 219 F. Supp. 876 (D.C. La. 1963); Gaines v. Dougherty County Board of Education, 222 F. Supp. 166 (D.C. Ga. 1963); Evers v. Jackson Municipal School District, 328 F2d 408 (C.A. 5th 1964); Millier v. Barnes, 328 F2d 810 (C.A. 5th 1964); Monroe v. Board of Commissioners of Jackson, 229 F. Supp. 581 (D.C. Tenn. 1964); Bush v. Orleans Parish School Board, 230 F. Supp. 509, 514 (D.C. La. 1963); Bradley v. School Board of Richmond, 345 F2d 310 (C.A. 4th 1965); Gillian v. School Board of Hopewell, 345 F2d 325 (C.A. 4th 1965); Kier v. School Board of Augusta County, 249 F. Supp. 239, 242 (D.C. Va. 1966); Downs v. Board of Education of Kansas City, 336 F2d 988, 998 (C.A. 10th 1964), cert. den. 380 U.S. 914 (1965); Deal v. Cincinnati Board of Education, 244 F. Supp. 572 (D.C. Ohio 1965), aff'd. 369 F2d 55 (C.A. 6th 1966), cert. den. 389 U.S. 847 (1967); Broussard v. Houston Independent School District, 395 F2d 817 (C.A. 5th 1968); Bowman v. County School Board, 382 F2d 326 (C.A. 4th 1967); Goss v. Board of Education of Knoxville, 270 F. Supp. 903 (D.C. Tenn. 1967); Lockett v. Board of Education of Muscogee County, 342 F2d 225 (C.A. 5th 1965); Avery v. Wichita Falls School District, 241 F2d 230, 233 (C.A. 5th

In an equally formidable array of decisions, racial imbalance arising from the operation of geographical zoning assignment plans has been upheld.[2]

In Deal v. Cincinnati Board of Education, 369 F2d 55 (C.A. 6th 1966), the Court held:

> "Appellants, however, pose the question of whether the neighborhood system of pupil placement, fairly administered without racial bais, comports with the requirements of equal opportunity if it nevertheless results in the creation of schools with predominantly or even exclusively Negro pupils. The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is

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1956); Stell v. Savannah-Chatham County Board of Education, 333 F2d 55, 59 (C.A. 5th 1964); and see cases cited in footnotes 10 and 11 of Blocker v. Board of Education of Manhasset, 226 F. Supp. 208 (D.C. N.Y. 1964).

2. Deal v. Cincinnati School Board, supra; Downs v. Board of Education of Kansas City, supra; Henry v. Godsell, 165 F. Supp. 87 (D.C. Mich. 1958); Thompson v. Arlington School Board, supra; Robinson v. Shelby County Board of Education, 311 F. Supp. 97 (D.C. Tenn. 1970); Bell v. School Board of Gary, supra; Monroe v. Board of Comm'rs. of Jackson, 221 F. Supp. 968 (D.C. Tenn. 1963) aff'd. 380 F2d 955 (C.A. 6th 1967), rev'd. on other grounds, 391 U.S. 450 (1968); Webb v. Board of Education of Chicago, 223 F. Supp. 466 (D.C. Ill. 1963); Lynch v. Kenston Board of Education, supra; Craggett v. Board of Education of Cleveland, 234 F. Supp. 381 (D.C. Ohio 1964); Gillian v. School Board of Hopewell, supra; Swann v. Charlotte-Mecklenberg Board of Education, 243 F. Supp. 667 (D.C. N.C. 1965), aff'd. 369 F2d 29 (C.A. 4th 1966); Clark v. Board of Education of Little Rock, 369 F2d 661 (C.A. 8th 1966); Mapp v. Board of Education of Chattanooga, 373 F2d 75 (C.A. 6th 1967); Moses v. Washington Parish School Board, 276 F. Supp. 834 (D.C. La. 1967); Goss v. Knoxville, 406 F2d 1183 (C.A. 6th 1969), and see cases discussed in 11 ALR 3d 780.

acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and administration through the use of neutral, easily determined standards, and better home-school communication. The Supreme Court in Brown recognized geographic districting as the normal method of pupil placement and did not foresee changing it as the result of relief to be granted in that case. Brown v. Board of Education, 347 U.S. 483, 495 note 13, question 4(a); Brown v. Board of Education, 349 U.S. 294, 300-01 (1955)."

To appellant's contention that all-black schools were illegal, the Court replied:

"We do not accept this contention. The element of inequality, in Brown was the unnecessary restriction on freedom of choice for the individual, based on the fortuitous, uncontrollable, arbitrary factor of his race. The evil inherent in such a classification is that it fails to recognize the high value which our society places on individual worth and personal achievement. Instead, a racial characterization treats men in the mass and is unrelated to legitimate governmental considerations. It fails to recognize each man as a unique member of society."

That this Court's decision in Brown I was based on the presence of an impermissible classification rather than upon any finding of educational injury independent of state-mandated segregation is also borne out by the cases which immediately followed, in which this Court struck down segregation in such unrelated, non-psychologically oriented facilities as parks, Mayor & C. of Baltimore v. Dawson, 350 U.S. 877 (1955), golf courses, Holmes v. Atlanta, 350 U.S. 879 (1955); city busses,

Browder v. Gayle, 352 U.S. 903 (1956); and later, prisons. Lee v. Washington, 390 U.S. 333 (1968).

(c) Assignment of Pupils By Race To Achieve Racial Balance or Desegregation Is Not Required.

> "Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race. . . racial classifications are constitutionally suspect. . . and subject to the 'most rigid scrutiny'. They bear a 'far heavier burden of justification than other classifications.'" Hunter v. Erickson, 393 U.S. 385, 391 (1969).

In Bolling v. Sharpe, 347 U.S. 497, 499 (1954), the assignment of children to schools in the District of Columbia on the basis of race was held to be a violation of due process of law, on the reasoning that "Classifications based solely upon race must be scrutinized with care, since they are contrary to our traditions and hence constitutionally suspect."

In McLaughlin v. Florida, 349 U.S. 184, 196 (1964), a state statute declaring interracial cohabitation illegal was invalidated on the reasoning that "an exercise of the police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race", although "enacted pursuant to a valid state interest, bears a heavy burden of justification"; and can be upheld "only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." In so holding, the Court found support from prior decisions which had invalidated state laws which required designation by race in voting and property records and ballots, and which required segregation in parks.

In striking down the Knoxville, Tennessee minority to majority transfer provision of the system's school desegregation plan, this Court declared:

> "Classifications based on race for purposes of transfers between public schools, as here, violate the Equal Protection Clause of the Fourteenth Amendment. As the Court said in Steele v Louisville & N.R. Co. 323 U S 192, 203, 98 L ed 173, 184, 65 S Ct 226 (1944), racial classifications are 'obviously irrelevant and invidious.'" Goss v. Board of Education of Knoxville, 373 U.S. 683, 687 (1963).

Just last year, in Alexander v. Holmes County Board of Education, 369 U.S. 19, (1969), the Court directed the lower federal courts in school cases to require school systems to,

> "[B]egin immediately to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color" (emphasis supplied).

In 1958, in the Little Rock School case, Cooper v. Aaron, 358 U.S. 1, 19, the Court held that:

> "[T]he constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by state legislators or state executive or judicial officers. . . "

In Rogers v. Paul, 382 U.S. 198 (1965), the Court held that a school desegregation plan under which children were assigned to school on the basis

of race was constitutionally impermissible.

In Loving v. Virginia, 388 U.S. 1, 11 (1967), state miscegenation statutes were declared void under the 14th Amendment on the reasoning that the statutes,

> ". . . [R]est solely upon distinctions drawn according to race."

In the jury discrimination cases, it has been held that "A defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venure or jury roll from which petit jurors are drawn." Swain v. Alabama, 380 U.S. 202, 208 (1965).

Similarly, a deliberate effort to limit the number of jurors because of racial considerations is unconstitutional. In Cassell v. Texas, 339 U.S. 282, 286-7 (1950), it was held:

> "We have recently written why proportional representation of races on a jury is not a constitutional requisite. Succinctly stated, our reason was that the Constitution requires only a fair jury selected without regard to race. Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color, proportional limitation is not permissible." (emphasis supplied) (286).

On the other hand, in Collins v. Walker, 329 F2d 100 (C.A. 5th 1964), an indictment against a Negro was held unconstitutional where it had been returned by a specially empaneled grand jury upon which 6 Negroes were deliberately included, the Court declaring:

> "A Negro is entitled to the equal protection of the laws, no less and no more. He stands equal before the law, and is viewed by the law as a person, not as a Negro. An accused cannot demand a mixed grand jury, some of which shall be of his same race. What an accused is entitled to demand under the Constitution 'is that in organizing the grand jury there shall be no discrimination against him because of his race or color."

In other words, a person may not be included or excluded solely because he is a Negro or because he is white. The requirement is that the system be designed without regard to race, and once the system is so designed, the fortuitous results that arise thereunder in any given instance afford no legitimate cause for complaint just because one race is not represented or is over-represented thereon.

In this case, both Negro and white parents are objecting to being assigned to schools solely on the basis of their race. Either Brown condemns this discrimination, or it means nothing. The protection of the Fourteenth Amendment is not limited to any particular race, nor to any particular type of case. Long ago, this Court rejected the notion that the Fourteenth Amendment was the special property of any particular class, for its provisions were held

to be". . . [U]niversal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race or color. . " Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

The clear meaning of Brown I is that the assignment of Negro pupils to public schools on the basis of race constitutes a classification and discrimination so invidious as to violate the Fourteenth Amendment. In so holding, the Court necessarily held that this was a judgment which was beyond the jurisdiction and power of state legislatures and Congress to make. This, notwithstanding the fact that 17 state legislatures had found the racial classifications to be worthy for reasons valid to them, and that the doctrine had been upheld by this Court on at least six prior occasions, by state courts 59 times, and by lower federal courts 13 times. See 23 Ga. B.J. 9, 27 (1960), where the cases are collected.

To say now that students nevertheless must be assigned to schools on the basis of race for reasons which this Court or any other Court today deems worthy is to assert for the judiciary the very power which was denied to the state legislatures and Congress, and this in spite of the fact that legislatures are presumptively deemed to possess more expertise in formulating questions of policy than the judiciary. It is nothing less than an intolerable affection of superior virtue, and assumes the character of a self-endowed

veto power. See Hand, The Bill of Rights, pp. 54-75. Separate but equal was a valid doctrine for 56 years, and such "an unbroken practice. . . openly and by affirmative state action. . . is not something to be lightly cast aside." Walz v. Tax Commission of New York, 397 U.S. 664 (1970); Jackson v. Rosenbaum, 260 U.S. 22, 31 (1922). Yet, to now uphold enforced racial assignments to achieve racial balance involves the Court in exercising educational policy judgments in an area of social science which is only in its incipiency and in which the concepts are subject to wide disagreement among the experts.[3] As recently stated for the Court by Mr. Justice Black:

> "The responsibility of this Court, however, is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations." Evans v. Abney, 396 U.S. 435 (1970).

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3. See Jensen,"How Much Can We Boost IQ and Scholastic Achievement", 39 Harv. Educ. Rev. 1, 84-5 (1969); Note, "Judicial Supervision of the Color-Blind School Board", 81 Harv. L.R. 1511, 1515 (1968); Fiss,"Racial Imbalance in the Public Schools; The Constitutional Concepts", 78 Harv. L.R. 564, 569 (1965); Kaplan,"Segregation Litigation and the Schools, Part II; The General Northern Problem," 54 N.W.U.L.R. 157, 175 (1963); Du Bois,"Does The Negro Need Separate Schools?", 4 Jour. Negro. Ed. 328, 331 (1935); U.S. Department of Health Education and Welfare, Office of Education, "Equality of Educational Opportunity," pp. 20-30; 307 (1966) (Coleman Report), and see article in the New York Times Magazine of May 2, 1965, by Martin Mayer, where it was said: "Not long ago, many of us felt that a large share of the Negro failure in the schools was itself the product of segregation; but almost nobody whose opinion is worth considering believes it today."

If the position of respondents is not correct, then the courts have come full-cycle from Brown: There, racial classifications were prohibited by the Constitution; now, they are held to be demanded by the same Constitution. If the rule is to be that racial classifications are illegal except those looked upon with favor by the Court, then it is no longer the Constitution which is the Supreme law of the land, but the transient views of the individuals who happen to occupy judicial office at any particular time.

The danger of such a doctrine, under which the Courts can pick and choose as between racial classifications deemed "benign" and those considered injurious, is that it opens the door for future courts to elevate to constitutional doctrine the racial policies of an Adolph Hitler under the guise of giving recognition to the latest theories of social science. "Every journey to a forbidden end begins with the first step. . . " Carter v. Carter Coal Company, 298 U.S. 238, 295 (1936).

Respondents do not construe the later decisions of this Court to require a different result.

In Green v. School Board of New Kent County, 391 U.S. 430, 437 (1968), it was held that the school board there was "charged with the

affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Reviewing the operation of the free choice plan in effect there, this Court held it inadequate. But the holding that the Board was under an "affirmative duty" to disestablish the dual system and convert to a unitary system is not tantamount to a holding that a school board must in all events place children of different races in the schools, or that the sufficiency of a plan is tested by the amount of actual mixing it produces. The problem with the free choice plan in New Kent was that it was not in fact "free". The system continued to assign faculty on a racial basis, and to operate its transportation system and all extracurricular activities on a segregated basis. It has long been the law that faculty segregation and other positive, discriminatory aspects of a school's operation render a freedom of choice plan defective, in that the very existence of such open evidences of continuing racial classification tend to discourage free exercise of the choice: "Faculty segregation encourages pupil segregation and is detrimental to achieving a constitutionally required non-racially operated school system." Clark v. Board of Education of Little Rock School District, 369 F2d 661, 669 (C.A. 8th 1966); United States v. Jefferson County Board of Education, 372 F2d 836, 883-5 (C.A. 5th 1966), adhered to on rehearing, 380 F2d 385 (1967), cert. den. sub nom. Caddo Parish School Board v. United States, 389 U.S. 840 (1967). "Unquestionably, to be constitutionally acceptable, a freedom

of choice plan will impose upon the school boards additional duties not required under a geographic plan." Kier v. County School Board of Augusta County, 249 F. Supp. 239, 247 (D.C. Va. 1966). "[T]he presence of all Negro teachers in a school attended solely by Negro pupils in the past denotes that school a 'colored school' just as certainly as if the words were printed across its entrance in six inch letters." Brown v. County School Board, 245 F. Supp. 549, 560 (D.C. Va. 1965).

More significant, in New Kent, the free choice plan did not require that pupils exercise their choice annually, and where they failed to do so, the school authorities simply reassigned these pupils to the school previously attended, thereby affirming the existing assignments which had been made on a racial basis.[4]

In Raney v. Board of Education of Gould School District, 391 U.S. 443, 445 (1968), the same situation prevailed—segregated faculty, continuation of assignments previously made on a racial basis where the choice was not exercised — plus one additional factor: When overcrowding of the previously all-white school occurred, the board rejected the application of Negro pupils without according priority on a proximity basis without regard to race, which is a recognized requirement in such cases. See

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4. See Brief of Petitioners in Green v. County School Board of New Kent County, supra, at pages 4-6, where these circumstances are related in full.

Stell v. Savannah-Chatham County Board of Education, 333 F2d 55, 65 (C.A. 5th 1964); United States v. Jefferson County Board of Education, supra, 372 F2d at 891.

In Monroe v. Board of Commissioners of Jackson, 391 U.S. 450, 454-5, the Board superimposed a freedom of choice plan upon a zoning plan, but the evidence here also disclosed racial discrimination not only in the allocation of faculty, but also in the assignment of pupils and the structuring of the zone lines. Consequently, the free choice plan did not meet the essential requirements of a valid freedom of choice plan, but was tantamount to initially assigning pupils on the basis of race.

On two subsequent occasions, the Court of Appeals for the Sixth Circuit has construed this Court's opinion in Monroe as not upsetting its previous holding to the effect that the Constitution does not require integration. Goss v. Board of Education of Knoxville, 406 F2d 1183 (C.A. 6th 1969); Deal v. Cincinnati Board of Education, 419 F2d 1387 (C.A. 6th 1969).

Consequently, in all of these three cases, the free choice plans were in fact found to be something other than "free". In all three cases, the boards of education were still engaged in positive acts of racial discrimination. The cases therefore do not stand for the proposition that

racial imbalance per se is illegal, even in a so-called de jure state.

This Court's more recent decisions in Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969), Dowell v. Board of Education of Oklahoma City, 396 U.S. 269 (1969); Carter et al v. West Feliciana Parish School Board, 396 U.S. 290 (1970) and Northcross v. Board of Education of Memphis, 397 U.S. 232 (1970) dealt not with the scope of desegregation, but with the timing. However, in Alexander, as pointed out by Chief Justice Burger's concurrence in Northcross, this Court did redefine the requirements of desegregation in more traditional language, for the school boards there involved were directed to begin operation immediately "as unitary school systems within which no person is to be effectively excluded from any school because of race or color."

If the Constitution now affirmatively requires an actual mixing of the races in the schools, it is not because of anything this Court has heretofore held, and such a holding would involve substantial rewriting of the Fourteenth Amendment.

To begin with, the language of the Amendment is negative - not positive: "[N]or shall any state. . . deny to any person within its jurisdiction the equal protection of the laws."

". . . [I]t cannot be said that the 14th Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform." Owenby v. Morgan, 256 U.S. 94, 112 (1921).

The amendment was obviously designed as a shield. If construed to require an affirmative assignment of children to schools on the basis of race, it has now been converted into a sword.

At the outset, we should distinguish several points which are not disputed here.

First, viewed in any light, Brown clearly does not permit even an initial assignment of Negro children to schools on a segregated basis, notwithstanding the fact that provisions may be made by a "pupil transfer" - type assignment plan whereby the child may remove himself from the school where he was racially assigned by state authorities.[5] "Negro

5. Bush v. Orleans Parish School Board, 308 F2d 491 (C.A. 5th 1962); Green v. School Board of Roanoke, 304 F2d 118 (C.A. 4th 1962); Davis v. Board of Education of Charleston, 216 F. Supp. 295 (D.C. Mo. 1963); Bell v. School Board of Powhatan, 321 F2d 494 (C.A. 4th 1963); Buckner v. School Board of Greene County, 332 F2d 452 (C.A. 4th 1964); Brown v. School Board of Frederick County, 234 F. Supp. 808 (D.C. Va. 1964); Marsh v. School Board of Roanoke, 305 F2d 94, 98 (C.A. 4th 1952); United States v. Jefferson County Board of Education, supra, 372 F2d at 890-1; Wheeler v. Durham Board of Education, 346 F2d 768 (C.A. 4th 1965); Bell v. School Board of Staunton, Virginia, 249 F. Supp. 249 (D.C. Va. 1966).

children can not be required to apply for that to which they are entitled as a matter of right." Northcross v. Board of Education of Memphis, 302 F2d 818 (C.A. 6th 1962).

Secondly, nor can it be contended that a school system may continue to utilize dual school zones,[6] or condition the admission of Negro children to white schools on their successfully withstanding intelligence tests and other admission requirements not imposed upon white children.[7] The foregoing principles respondents concede, although it should be observed that at an early period in the desegregation process this Court did uphold a pupil "placement" or "transfer" plan which provided for the initial assignment of Negro pupils to their old schools with the right to transfer out upon applying and satisfying a long list of criteria. Shuttlesworth v. Birmingham Board of Education, 162 F. Supp. 372 (D.C. Ala. 1958), aff'd. 358 U.S. 101 (1958).

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6. Northcross v. Board of Education of Memphis, 302 F2d 818 (C.A. 4th 1962); Nesbit v. Statesville Board of Education, 345 F2d 333 (C.A. 4th 1965); Kemp v. Beasley, 352 F2d 14 (C.A. 8th 1965); Brown v. County Board of Frederick County, 346 F2d 22 (C.A. 4th 1965).

7. Hamm v. County School Board of Arlington County, 264 F2d 945 (C.A. 4th 1959); Jones v. Alexandria School Board, 278 F2d 72 (C.A. 4th 1960); Allen v. School Board of Charlottesville, 203 F. Supp. 225 (D.C. Va. 1961).

Nor can it be disputed that a free choice plan would not be sufficient if enmeshed in a pattern of violence or intimidation.[8]

But these cases are a far cry from the interpretation being placed upon the "affirmative duty" language of this Court's opinion in Green (391 U.S. at 437), as will be discussed momentarily. First, however, there are four other categories of decisions which require consideration here.

First, a few cases have held unqualifiedly that the Fourteenth Amendment requires some semblance of racial balance regardless of whether any acts of state discrimination are present:[9] "The central

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8. Coppedge v. Franklin County Board of Education, 394 F2d 410 (C.A. 4th 1968); United States v. Elloree School District, 283 F. Supp. 557 (D.C. S.C. 1968); Singleton v. Anson County Board of Education, 283 F. Supp. 895 (D.C. N.C. 1968).

9. Hobson v. Hansen, 269 F. Supp. 401 (D.C. D.C. 1967), vacated, 408 F2d 175 (C.A. D.C. 1969); Branche v. Board of Education of Hempstead, 204 F. Supp. 150 (D.C. N.Y. 1962); Barksdale v. Springfield School Committee, 237 F. Supp. 543 (D.C. Mass. 1965), disapproved, 348 F2d 261 (C.A. 1st 1965); Spangler v. Pasadena Board of Education, 311 F. Supp. 501 (D.C. Cal. 1970); Jackson v. Pasadena School District, 59 Cal. 2d 876, 382 P2d 878 (1963); Blocker v. Board of Education of Manhasset, 226 F. Supp. 208 (D.C. N.Y. 1964); Davis v. School District of Pontiac, 309 F. Supp. 734 (D.C. Mich. 1970).

constitutional fact is the inadequacy of segregated education. That it is not coerced by direct action of an arm of the state cannot alone, be decisive of the issue of deprivation of constitutional right. . . . The educational system that is thus compulsory and publicly afforded must deal with the inadequacy arising from adventitious segregation; it cannot accept an indurate segregation on the ground that it is not coerced or planned but accepted. . . . Failure to deal with a condition as readily inflicts it as does any grosser imposition of it." Branche v. Board of Education of Hempstead, supra (204 F. Supp. at 153). "But that is not the question (a duty to remedy de facto segregation). The question is whether there is a constitutional duty to provide equal educational opportunities for all children within the system." Barksdale v. Springfield School Committee, supra (237 F. Supp. at 546).

Second, other cases utilize language similar in nature, but which is of dubious consequence because of being uttered in the context of a finding of deliberate, state sponsored discrimination.[10]

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10. Taylor v. New Rochelle Board of Education, 191 F. Supp. 181 (D.C. N.Y. 1961), S.C. 195 F. Supp. 231 (1961), aff'd. 294 F2d 36 (C.A. 2nd 1961), cert. den. 368 U.S. 940 (1961); S.C., 221 F. Supp. 275 (1963); Dowell v. School Board of Oklahoma City, 219 F. Supp. 427 (D.C. Okl. 1963), aff'd 375 F2d 158 (C.A. 10th 1967); S.C. 244 F. Supp. 1965 (1965), cert. den. 387 U.S. 931 (1967); United States v. School District 151, 301 F. Supp. 201 (D.C. Ill. 1969); S.C., 286 F. Supp. 786 (1968), aff'd. 404 F2d 1125 (C.A. 7th 1969); Swann v. Charlotte-Mecklenberg Board of

Third, some cases, while declaring that the Constitution does not require integration, uphold voluntary efforts of state authorities to assign pupils on the basis of race so as to overcome racial imbalance.[11]

Fourth, seizing upon this Court's "affirmative duty" language in the Green triology, and in the case of the Fifth Circuit, upon the sweeping, doctrainaire generalizations of United States v. Jefferson County Board of Education, supra, some courts have increasingly echoed the affirmative duty concept, and relying upon a de facto, de jure distinction, tested the sufficiency of desegregation plans upon a quantitative basis, and held that a plan which does not in fact bring about mixing in the classroom is defective without more. See, for example, Kemp v. Beasley, 389 F.2d 178 (C.A. 8th 1968); U. S. V. Hinds County Board of Education, 402 F2d 926 (C.A. 5th 1968); S.C., 423 F2d 1264 (1969); S.C. 417 F2d 853 (1969); Singleton v. Jackson Municipal Separate School District, 419 F2d 1211

Education, 300 F. Supp. 1291 (D.C. N.C. 1969), S.C., 306 F. Supp. 1291 (1969); S.C., 306 F. Supp. 1299 (1969); S.C. 311 F. Supp. 265 (1970), rev'd. in part, ____F2d____(C.A. 4th 1970), certiorari pending; Keyes v. School District No. 1 of Denver, 30. F. Supp. 289 (D.C. Colo. 1969).

11. Olson v. Malverne, 250 F. Supp. 1000 (D.C. N.Y. 1966); Offerman v. Nitkowski, 248 F. Supp. 129 (D.C. N.Y. 1965); Norwalk CORE v. Norwalk Board of Education, 298 F. Supp. 213 (D.C. Conn. 1968); Tometz v. Board of Education, 39 Ill. 2d 593, 237 N.E. 2d 498 (1968); Balaban v. Rubin, 242 NYS 2d 973, 40 Misc. 2d 249 (1963), rev'd. 144 NY 2d 193, 199 N.E. 375 (1964), cert. den. 379 U.S. 881 (1964); Fuller v. Volk, 230 F. Supp. 25 (D.C. N.J. 1964); S.C. 250 F. Supp. 81 (1966); Addabbo v. Donovan, 26 App. Div. 2d 383, 256 N.Y.S. 2d 178 (1965), aff'd. 16 N.Y. 2d 619, 209

(C.A. 5th 1969); S.C., 246 F2d 1364 (1970); S.C., ____F2d___(1970); Valley v. Rapides Parish School Board, 423 F2d 1132 (C.A. 5th 1970); Hall v. St. Helena Parish School Board, 424 F2d 320 (C.A. 5th 1970); Nesbit v. Statesville City Board of Education, 418 F2d 1040 (C.A. 4th 1969); Bivins v. Bibb County Board of Education, 424 F2d 97 (C.A. 5th 1970); Hilson v. Ouzts, 421 F2d 632 (C.A. 5th 1970); Walker v. County School Board of Brunswick County, 413 F2d 53 (C.A. 4th 1969); Felder v. Harnett County Board of Education, 409 F2d 1070 (C.A. 4th 1969); Davis v. School Commissioners of Mobile, 414 F2d (C.A. 5th 1969); S.C. ____F2d____(C.A. 5th 1970). "Black nationalists and white racists notwithstanding, school integration is relevant: It is an educational objective as well as a constituional imperative." Henry v. Clarksdale Municipal Separate School District, 409 F2d 682, 689 (C.A. 5th 1969). ". . . [A] point has been reached in the process of school desegregation where it is not the spirit, but the bodies which count." United States v. Indianola Separate School District, 410 F2d 626, 631 (C.A. 5th 1969).

The Fifth Circuit has even advanced to the extent of holding the existence of a single all-Negro school unconstitutional. Adams v. Matthews, 403 F2d 181, 188 (C.A. 5th 1968); Henry v. Clarkesdale Municipal Separate School District, supra, at p. 689; United States v. Hines County School Board, 417 F2d 853 (C.A. 5th 1969); Hall v. St. Helena Parish School Board, 417 F2d 801, 807 (C.A. 5th 1969). However

N.E. 2d 112, cert. den. 382 U.S. 905 (1965); Booker v. Board of Education, 45 N.J. 161, 212 A2d 1 (1965), School Committee of Boston v. Board of Education, 352 Mass. 693, 227 N.E.2d 729 (1967), and see, 11 ALR 3d 780.

the Fifth Circuit later modified this by holding that all-Negro schools might be "abolished" by assignment of white pupils for a part of the day. United States v. Board of Education of Baldwin County, 417 F2d 848 (C.A. 5th 1969); Hightower v. West, ___F2d___ (C.A. 5th 1970), and at least one panel of the Court seems to have abandoned it altogether in the context of neighborhood zoning plans in metropolitan areas. See Ellis v. Board of Instruction of Orange County, Florida, 423 F2d 203 (C.A. 5th 1970); Mannings v. Board of Public Instruction of Hillsborough County, 427 F2d 874 (C.A. 5th 1970). On the other hand, an entirely different rule seems to be applicable to rural systems. Andrews v. City of Monroe, 425 F2d 1017 (C.A. 5th 1970); Henry v. Clarkesdale Municipal Separate School District, supra. Hardly does one decision receive circulation until something new is articulated. One test was stated in terms of whether there is "a reasonable alternative" offering more promise of success, and whether or not the plan results in "a substantial number of Negro students (receiving) their entire public school education in a segregated school environment. . . " Singleton v. Jackson Municipal School District, 426 F2d 1364 (C.A. 5th 1970); Taylor v. Quachita Parish School Board, 424 F.2d 324 (C.A. 5th 1970).

Bona fide neighborhood zoning plans have been struck down under the de facto - de jure distinction which unquestionably would be upheld in

any state outside the South, on the reasoning that the plans do not in fact bring about mixing. Davis v. Board of Commissioners of Mobile County, 393 F2d 690 (C.A. 5th 1968); United States v. Greenwood School District, 406 F2d 1086 (C.A. 5th 1969); Henry v. Clarksdale Municipal Separate School District, 409 F2d 682 (C.A. 5th 1969); United States v. Indianola Municipal Separate School District, 410 F2d 626 (C.A. 5th 1969); Clark v. Board of Education of Little Rock, 426 F2d 1035 (C.A. 8th 1970).

Eroneously seizing upon this court's affirmance in United States v. Montgomery County Board of Education, 395 U.S. 225 (1969) as laying down a general rule for all cases, the Court has gone all the way from requiring across the board faculty ratios of one in each school, United States v. Jefferson County Board of Education, supra (372 F2d at 900); one in five, United States v. Board of Education of Baldwin County, 417 F2d 848 (C.A. 5th 1969); one in three, United States v. Choctaw County Board of Education, 417 F2d 838 (C.A. 5th 1969); to proportional representation in each school in the same ratio as the faculty ratio of black to white for the system as a whole. Singleton v. Jackson Municipal Separate School District, supra, (419 F2d 1211).

Not to be outdone in the numbers game, the district court in the Norfolk case required student desegregation to the "approximate minimum of 10% where possible" Beckett v. School Board of Norfolk, 308 F. Supp.

1274 (D.C. Va. 1969), only to be reversed by the Court of Appeals on the reasoning that limiting of Negro enrollment in any school to 40% constitutes invidious discrimination.____F2d_____ (en banc, June 22, 1970). In the Charlotte case now before this Court, the district court has decreed racial balance in each school while at the same time disavowing any purpose to do so, only to be followed by the Court of Appeals' modifying opinion holding that this is permissible provided it is "reasonable". But perhaps the grand prize should go to the district court in the Northern District of Georgia which, in an unreported decision in United States v. State of Georgia, C.A. 12972, has placed 81 school systems in Georgia under a decree requiring that 75% of each system's minority students be in attendance at "desegregated schools", defined as a school at wh ich minority enrollment is not less than 50 nor more than 150% of the system wide minority percentage.

Lastly, still pursuing its asserted power to formulate uniform decrees in these cases, the Fifth Circuit has now required that each plan make provision for appointment of a bi-racial advisory committee, and a majority-to-minority transfer option with priority for space and school-furnished transportation. Singleton v. Jackson Municipal School District, 426 F2d 1364 (1970); Davis v. Board of School Comm'rs. of Mobile, ___F2d____(1970); Hightower v. West, ___F2d____ (1970); Mannings v. Board of Public Instruction, 427 F2d 874, 878 (1970).

It is respondents' position that it is beyond the power of any court or HEW to require that there be an actual mixing of the races in the public schools regardless of the circumstances. While respondents deny the power of a school board voluntarily to assign pupils so as to overcome racial imbalance even as a matter of uncoerced, educational policy, supra, p. 37, f.n. 11, it is not necessary for this Court to go this far in order to find in favor of respondents in this case. The Court need only hold here that HEW coult not require it. The Constitution merely prohibits discrimination. If discrimination is lacking, and the system is structured on a non-racial basis, it is likely in most cases that Negro and white pupils will attend schools together, but the fact that in any given system or school they do not should not mean that the Constitution has been violated. But this is precisely the effect of recent decisions in the Fifth, Fourth and Eighth Circuits, in varying degrees.

None of these decisions undertake to articulate a rationale for this doctrine. It may be that these cases purport to lay down a special rule for formerly de jure states only. We hope, however, that we have shown elsewhere in this brief that (a) the de facto - de jure distinction is not a valid one; (b) the distinction has no practical difference as far as the minority pupil suffering from racial isolation is concerned, and (c) in any event, the constitution does not permit the rights of minority children to be vindicated by depriving the majority children of the same rights.

It is submitted, however, that the rationale of the cases requiring integration rather than freedom from state-enforced segregation is not merely a flimsy de jure distinction, but rather, a judicial assumption that the educational and psychological development of the minority child is retarded by racial isolation per se, and that this condition can be alleviated only by an affirmative program of integration achieved at all costs.[11A] This rationale would invoke the principle of Griffin v. Illinois, 351 U.S. 12, 17 (1956), to the effect that "[A] law nondiscriminatory on its face may be grossly discriminatory in its operation," (f.n. 11), and that "Failure to deal with a condition as readily inflicts it as does any grosser imposition of it," Branche v. Board of Education, supra, p. 36.

This proposition necessarily would cut across all de jure - de facto distinctions, and result in a principle which would equally affect all states in the nation. Whether or not such a duty exists requires this Court to resolve a question which has not been made clear, but which respondents submit the Court now can no longer avoid, and that is: What is the holding of Brown, (1) That racial classifications for the purpose of public education are constitutionally impermissible, or (2) That the Constitution requires equal educational opportunity? If the latter is correct, then freedom from state enforced segregation is not enough, and racial isolation

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11A. Respondents do not concede the validity of this premise, i.e., that minority children do suffer educational disadvantage from racial isolation. See page 27, n. 3, supra. However, because respondents consider that this is the reasoning behind most of the recent decisions, we must answer it here.

is per se unconstitutional regardless of the underlying cause. Until this basic question is resolved, the lower courts will continue to founder in seas of conceptual uncertainty. Already, this uncertainty has played havoc with public education. Conflicting opinions often come down within the same month. School boards are repeatedly told that what they are doing is not enough, but they are never told what "enough" consists of. As a result, teachers, administrators and students are deserting the public schools en masse.

Elucidation of the question requires an examination of the "equal educational opportunity" doctrine. For example, one district court in Illinois stated it this way:

> "The separation of black and white children is in itself an inhibiting factor. In any community where one school is black and one predominantly white nobody needs to be told which is considered the good school. This is the case whether segregation is the result of an old housing pattern, the flight of white residents or the construction of a new school on a site beyond the walking distance of Negro children. The implication, and not infrequently the assertion, that the Negro school is 'undesirable' disheartens both pupils and teachers and limits their expectations. Because it saps the pupils' motivation, his achievement,

level drops below his actual capacity and gives ostensible confirmation to the fear that he is somehow deficient." United States v. School District 151, 301 F. Supp. 201, 205 (D.C. Ill. 1969).

Another court expressed it somewhat differently, viz.:

"The minority citizens are products, in many instances, of parents who received inferior educations and hence the home environment which is looked to for many fundamental sources of learning and knowledge yields virtually no educational value. Thus, the only hope for raising the level of these students and for providing them the equal education which the Constitution guarantees is to bring them into contact with classroom associates who can contribute to the learning process; it is now clear that the quality and effectiveness of the education process is dependent on the presence within the classroom of knowledgeable fellow students." Keyes v. School District No. 1 of Denver, 313 F. Supp. 90, 96-7 (D.C. Colo. 1970).

It is submitted that such decisions are not only beyond the power of the judiciary to make, but are also fraught with grave consequences for white and black children as well as the courts.

To the Negro child, the concept would seem to brand him with the very thing which it ostensibly seeks to erase - the stigma of inferiority - for that is precisely the underpinning of the doctrine. Stripped of all psychological jargon, the doctrine comes down to this: The Negro is inferior,

and can be elevated only by association with his superiors. (No one has yet contended that such association helps the white child educationally.[12])

Some Negro leaders have recognized the doctrine for what it is. Stokely Carmichael was recently quoted as protesting against forced integration with the observation that "if integration means that moving to something white is moving to something better, then integration is a subterfuge for white supremacy." Leiberman, "Teachers and the Fourteenth Amendment," 46 N.C.L.R. 313, 328 (1968). See also 31 Mo. L.R. 391, 411 (1961). In the context of racial classifications, "equal application" is not enough, and a classification predicated upon an assumption of white supremacy is unconstitutional. Loving v. Virginia, 388 U.S. 1, 8, 11 (1967).

From the standpoint of the white parents, it is submitted that their children cannot, consistent with the liberty guaranteed by the due process clause, be utilized by the state as a catalyst for the benefit and improvement of someone else's children. "The desire of the legislature to foster a homogeneous people with American ideals, prepared readily to understand current discussions of civic matters, is easy to appreciate. Unfortunate experiences during the late war, and aversion toward every characteristic of truculent adversaries, were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations

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12. See Beckett v. School Board of Norfolk, 308 F. Supp. 1274, 1281 (D.C. Va. 1969).

upon the power of the state, and conflict with rights assured to plaintiff in error." Meyer v. Nebraska, 262 U.S. 390, 402 (1923). "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children. . . The child is not the mere creature of the state; those who nuture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). "The present case then concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. . . ", and ". . . a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Griswold v. Connecticut, 381 U.S. 479, 485 (1965). "In sum, the Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the federal government or the states is not restricted to rights specifically mentioned in the first eight amendments". Griswold v. Connecticut, supra, p. 493 (Goldberg, concurring).

In this case, unlike most school cases, objecting parents, both black and white, are parties of record, thereby insuring that "concrete adverseness which sharpens the presentation of issues upon which the court

so largely depends for illumination of difficult constitutional questions", Flast v. Cohen, 392 U.S. 83, 99 (1968); Jenkins v. McKeithen, 395 U.S. 411, 423 (1969), and consequently, it is not unusual that no previous cases have considered the questions from the vantage point presented here. Respondents do not claim that they have a constitutional right to choose the particular school which they are to attend. They do contend that due process prevents their being arbitrarily assigned for any reason which government may decide upon, and that their assignment on the basis of race for the professed purpose of creating a homogeneous society desired by the dominant political voice of the day is just as arbitrary and unreasonable as the notion of Plato that all wives and children should be held in common, referred to in this Court's opinion in Meyer v. Nebraska, supra.

Not only does the doctrine of forced integration portend mischief for students, but it also places this court in an impossible position. Assuming that racial isolation in the schools gives rise to constitutional deprivation, what is to be done in the District of Columbia and all of the other metropolitan areas referred to in the Amicus brief of the State of Georgia filed in this case (Brief, pp. 7-10) which show a progressively advancing degree of isolation of Negro pupils, already exceeding 50% in 11 of the Nation's major cities? It would result that a large part of the Negro children in our public schools would be suffering from a deprivation

which no Court was capable of remedying. It is certainly irresponsible for a court to tell the Negro community that an integrated education is indispensable to a quality education "when it has neither the power nor the resources to create the necessary prerequisite." McBryde, "Constitutional Law, De Facto Segregation: The Courts and Urban Education," 46 N.C.L.R. 89 (1967).

Moreover, what court is possessed of the necessary expertise to resolve the troublesome educational problems which such a holding entails? As has been well expressed:

> "A more serious problem arises from the nature of the factual determinations which the Court must make. A court applying the. . . doctrine must necessarily resolve disputed issues of educational policy by determining whether integration by race or class is more desirable; whether compensatory programs should have priority over integration; whether equalization of physical facilities is an efficient means of allocating available resources for the purpose of achieving overall equal opportunity. There is a serious danger that judicial prestige will be committed to ineffectual solutions, and that expectations raised by Hobson-Like decisions will be disappointed. Furthermore, judicial intervention risks lending unnecessary rigidity to treatment of the social problems involved by foreclosing a more flexible experimental approach." Comment, Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board, 81 Harv. L.R. 1511, 1525 (1968).

This clearly does not present a case for which "judicially-manageable standards" are reasonably to be articulated. Baker v. Carr, 369 U.S. 186, 226 (1962). As stated by the Court of Appeals for the First Circuit in rejecting the contention that a constitutional right exists to attend mixed schools, "The difficulties prophesied in applying the relatively simple rule of 'one man, one vote' would seem small in comparison". Springfield School Committee v. Barksdale et al, 348 F2d 261, 264 (C.A. 1st 1965). And, as recently observed by Professor Freund, the problem of minority deficiencies is more appropriately met by framing "programs of aid in terms of reaching the most disadvantaged segment of the community", than by affording preferential treatment. Freund, "Civil Rights and The Limits of Law," 14 Buff. L.R. 199, 204 (1964).

Nor can the doctrine justifiably be limited to formerly de jure states as held in United States v. Jefferson County Board of Education, supra, 372 F2d at 873, for if racial isolation is injurious to minority pupils, it would make no difference whether as a historical matter its genesis is traceable to law or neighborhood patterns. School desegregation laws have been void for over 16 years. Is it reasonable to assume that a Negro child in an all-black school in Chicago does not suffer from the racial isolation whereas a Negro child in Georgia does? Do school age children appreciate the conceptual differences between de jure and de facto?

Aside from this, racial isolation in any state can be traced back to some vestige of state action if one is inclined to look very hard. Almost all states at one time enforced restrictive covenants, and zoning laws, federal housing programs and urban renewal programs were racially oriented; also, the conscious adoption by the state of a neighborhood school plan within the context of known, existing residential segregation is itself such "a significant involvement" by the state as to inject 14th Amendment state action. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961). See Fiss, "Racial Imbalance in the Public Schools: The Constitutional Concepts," 78 Harv. L.R. 564, 584 (1965)[13]; Spangler v. Pasadena Board of Education, 311 F. Supp. 501, 512 (D.C. Calif. 1970); Swann v. Charlotte-Mecklenberg Board of Education, 306 F. Supp. 1299 (D.C.N.C. 1969), rev'd. in part, ____F2d____(1970); Dowell v. School Board of Oklahoma City, 219 F. Supp. 427, 433 (D C. Okl. 1963), aff'd. 375 F2d 158 (C.A. 10th 1967), cert. den. 387 U.S. 931 (1967). "If residential racial discrimination exists, it is immaterial that it results from private action. The school board cannot build its exclusionary attendance areas upon private racial discrimination." Brewer v. School Board of Norfolk, 397 F2d 37, 41-2 (C.A. 4th 1968). As this Court noted in Brown I, "But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent

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13. "It is the thesis of this article that the labels 'de facto segregation' and 'state action' only obscure the issue of governmental responsibility, and that in every case of racially imbalanced schools sufficient responsibility can be ascribed to government to satisfy the requirement that stems from the equal protection clause's proscription of unequal treatment by government." 78 Harv. L.R. at 584.

that such segregation has long been a nationwide problem, not merely one of sectional concern." 347 U.S. at 491, f.n. 6. And, in Gaston County North Carolina v. United States, 395 U. S. 285, 293-6 (1969), this Court assumed without qualification that a segregated education as far back as 1908 would continue to exert deleterious effects today.

(d) The Assignment Of Children By Race Can Not Be Justified Under The "Disestablishment" Cases Or As A Means Of Remedying The Effects Of Past Discrimination.

The justification for assignment of pupils by race, at least in a so-called "de jure" state, is that while the state under normal circumstances would not be required to do this, it is compelled to do so where segregation previously was mandated by law, under either or both of two doctrines: (1) The "disestablishment" decisions, and (2) As a means of eradicating the effects of past discrimination.

With respect to "disestablishment", reliance is usually posited upon cases holding that in anti-trust actions, the Court may go beyond a prohibitory injunction, and order dissolution and stock divesture as appropriate remedies. See United States v. Crescent Amusement Co., 323 U.S. 173, 189 (1944), Schine Chain Theatres v. United States, 334 U.S. 110, 126-130 (1948) and Standard Oil Company v. United States, 221 U.S. 1, 77

(1910). In these cases, however, the Courts deal with persons or entities all of whom are wrongdoers. As stated in United States v. Crescent Amusement Company, supra,

> "These who violate the act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience." (323 U.S. at 189).

In the school cases, as here, however, it is not the wrongdoers who are complaining, but innocent parties whose constitutional rights not to be discriminated against on the basis of race are being violated as a means ostensibly of affording the self-same rights to other pupils whose supposed injury was inflicted not by the objecting pupils, but by the agents of the state, over whom the objecting parties have no control.

With respect to the second basis of justification, i.e., eradicating the effects of past discrimination, reliance is usually reposed in the doctrine first definitively described in United States v. Jefferson County Board of Education, supra, 372 F2d at 876, and its lifting of the doctrine from the voting cases under the "freezing principle."

The "freezing principle" employed in the voting cases for the proposition that where discrimination is shown to exist, the Court is empowered to eradicate the effects of the past discrimination, Louisiana v.

United States, 380 U.S. 145, 13 L.Ed. 2d 709 (1965); United States v. Ward, 349 F. 2d 795 (C.A. 5th 1965); United States v. Lynd, 349 F. 2d 785 (C.A. 5th 1965); United States v. Ward, 345 F. 2d 857 (C.A. 5th 1965); United States v. Parker, 236 F. Supp. 511 (D.C. Ala. 1964); United States v. Mississippi, 339 F.2d 279 (C.A. 5th 1964); United States v. Ramsay, 331 F. 2d 824 (C.A. 5th 1964); United States v. Atkins, 323 F.2d 733 (C.A. 5th 1963); United States v. Penton, 212 F. Supp. 193 (D.C. Ala. 1962); United States v. Duke, 332 F. 2d 759 (C.A. 5th 1964), does not support the affirmative assignment of respondents to overcome racial imbalance, for the simple reason that two wrongs do not make a right, and objecting pupils in 1970 may not be discriminated against on the basis of race by being assigned according to racial quotas in order to overcome the effects of supposed discriminatory assignments made in the past by other school officials over which they had no control.

In the "freezing" cases, this Court held merely that because otherwise valid state registration requirements had not been applied to white voters, they also could not be applied to Negro voters, so as to undo the effects of past discrimination. The effect was to relieve Negroes of burdens imposed by state law, not because those burdens were themselves invalid, but because in practice they had not been applied to white voters, and relieving Negroes of compliance therewith was the only feasible method

of achieving equal protection. This Court did not hold, however, that having found that Negro voters were subjected to discriminatory treatment, the white voters also must be subjected to such treatment, which is tantamount to what is sought to be required here. The voting cases stand for the proposition that the discriminatee is entitled to the favored treatment; not that he is entitled to demand that the favored class also be deprived of their rights of equal protection.

Even granted that it is desirable or necessary to overcome the effects of past racial assignments, this legitimate end can not be accomplished by means that transcend the Constitution. What was said in Buchanan v. Warley, 245 U.S. 60, 81 (1917), is pertinent here, to wit:

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."

And, as stated in Oyama v. California, 332 U.S. 633, 646 (1948):

> "But assuming, for purposes of argument only, that the basis (requirement) is constitutional, it does not follow that there is no constitutional limit to the means which may be used to enforce it."

And, in Cooper v. Aaron, 358 U.S. 1, 16 (1958) after quoting from Buchanan, the Court held that mob violence was no valid basis for setting aside a desegregation plan, declaring.

> "Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights."

And, in First Amendment Cases, the Court has evolved the rule that the public peace can not be preserved by depriving the speaker of his freedom to speak because of fear that others disagreeing therewith may resort to violence, Wright v. Georgia, 373 U.S. 284, 293 (1963), for "constitutional rights may not be denied simply because of hostility to their assertion or exercise." Watson v. Memphis, 373 U.S. 526, 535 (1963); Cox v. Louisiana, 379 U.S. 536 (1965).

Here, the constitutional end of overcoming the effects of past discrimination can not be achieved by depriving teachers of their constitutional rights. As said in Olson v. Board of Education of Union Free School District No. 12, 250 F. Supp. 1000 (D.C. N.Y. 1966), app. dismissed, 367 F2d 565 (C.A. 2nd 1966):

> "In attempting to formulate a plan which will provide equal educational opportunities to a minority group, it is elementary that the plan should not at the same time deprive the majority group of its constitutional rights. 'The constitutional rights of one class of citizenry may not

be sacrificed or suppressed in order to vindicate or render more secure the constitutional rights of another class' (Addabbo v. Donovan, supra, 22 A.D. 2d, p. 390, 256 NYS 2d p. 185). This principle was clarified in Springfield School Committee v. Barksdale, 1 Cir. 1965, 348 F2d 261, where the Court said: * * * * When the goal is to equalize educational opportunity for all students, it would be no better to consider the Negro's special interests exclusively than it would be to disregard them completely.' (p. 264)".

And, as recently declared by the Sixth Circuit:

"Appellants are not the only children who have constitutional rights. There are Negro, as well as white, children who may not want to be bussed away from the school districts of their residences, and they have just as much right to attend school in the area where they live. They ought not to be forced against their will to travel out of their neighborhoods in order to mix the races." Deal v. Cincinnati Board of Education, 419 F2d 1387 (C. A. 6th 1969).

(2) The Assignment of Children on the Basis of Race to Overcome Racial Imbalance is in Violation of the Civil Right Act.

Section 401 of the Civil Rights Act of 1964 declares that "Desegregation shall not mean the assignment of students to public schools in order to overcome racial imbalance," 42 USCA 2000c, and Section 407a provides that "Nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any

school by requiring the transportation of pupils or students from one school to another, or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." 42 USCA 2000 c-6.

The Elementary and Secondary Education Act of 1965, as amended, declares that "In the administration of this chapter no department, agency, officer or employee of the United States, shall exercise any direction, supervision or control over the personnel, curriculum or program of instruction of any school or school system, or any local or state educational agency or require the assignment or transportation of students or teachers in order to overcome racial imbalance." 20 USCA 242.

The 1968 Appropriations Act, applicable to the period in question here, is even more specific:

> §409. "No part of the funds contained in this act may be used to force bussing of students, abolishment of any school, or to force any student attending any elementary or secondary school to attend a particular school against the choice of his or her parents or parent in order to overcome racial imbalance."
>
> §410. "No part of the funds contained in this act shall be used to force bussing of students, the abolishment of any school, or the attendance of students at a particular school in order to overcome racial imbalance as a condition precedent to obtaining federal funds otherwise

available to any state, school district or school; * * * * * * * Provided further, That notwithstanding any other provision of law, funds or commodities for school lunch programs or medical services may not be recommended for withholding by any official employed under appropriations contained herein in order to overcome racial imbalance." PL 90-557, Title IV, 1 US Code Cong. Adm. News, p. 1145-46 (1968).

Sections 401 and 407a specifically apply only to Title 4 actions brought by the Attorney General, but the other sections quoted above apply to all federal officials, and in any event, the Title 4 sections constitute a definitive declaration of congressional intent under the enforcement clause (§5) of the Fourteenth Amendment. See South Carolina v. Katzenbach, 383 U.S. 301 (1966); United States v. Gainey, 380 U.S. 63 (1965); Ferguson v. Skrupa, 372 U.S. 726 (1963); Glidden Co. v. Zdanok, 370 U.S. 530 (1962); Griswold v. Connecticut, 381 U.S. 479 (1965); United States v. County Board of Electors, 248 F. Supp. 316, 322 (D.C. N.Y. 1965), app. dism. 383 U.S. 575 (1966).

In the present case, the desegregation plan under attack was adopted by the Clarke County Board of Education pursuant to compulsion of HEW in pending Title 6 enforcement proceedings (A. 97, 164, 223). Consequently, contrary to the Petitioners' contentions, this is not a case where the action of the Clarke County Board of Education is to be appraised as if the Board had voluntarily adopted the plan in question as a matter of

independently-formulated policy. Peterson v. Greenville, 373 U.S. 244 248 (1963); Lombard v. Louisiana, 373 U.S. 267, 273 (1963); Griffin v. Maryland, 37 3 U.S. 130, 135 (1964), and see Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 725 (1961); Shelley v. Kramer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948). For these reasons, the desegregation plan in dispute is subject to the proscriptions of the federal statutes quoted above, and its legality must be tested thereby, for "the (government) is responsible for the discriminatory act of a private party when the (government) by its law, has compelled the act." Adickes v. Kress & Company, 398 U.S. 144, 26 L.Ed.2d at 161 (1970). If this analogy to "state action" concepts under the Fourteenth Amendment is not applicable in determining the applicability of the anti-bussing provisions to desegregation plans adopted by state school boards under federal compulsion, it is difficult to perceive how the statutes could ever be invoked.

Therefore, the evidence being undisputed that the plan in question was adopted solely for the purpose of achieving racial balance (A. 42, 82, 97, 113), the Supreme Court of Georgia correctly held that the Civil Rights Acts were violated by the plan (A. 232).

Respondents do not overlook several decisions which hold that these anti-bussing statutes do not apply to the southern states, but only to the so-called de facto segregated situations in the North.

United States v. Board of Education of Jefferson County, 372 F2d 836, 874-888 (C.A. 5th 1967), adhered to on rehearing en banc, 380 F2d 385 (1967), cert. den. sub nom. Caddo Parish School Board v. United States, 389 U.S. 840 (1967); Keyes v. School District No. 1 of Denver, Colo., 303 F. Supp. 289 (D.C. Colo. 1969); U. S. v. School District 151 of Cook County, 301 F. Supp. 201 (D.C. Ill. 1969); Harvest v. Board of Instruction of Manatee County, 312 F. Supp. 269 (D.C. Fla. 1970); Moore v. Tangipahoa Parish School Board, 304 F. Supp. 244 (D.C. La. 1969); Spangler v. Pasadena Board of Education, 311 F. Supp. 501 (D.C. Calif. 1970); United States v. Board of Trustees of Crosby Independent School District, 424 F2d 625 (C.A. 5th 1970), and compare, Swann v. Charlotte-Mecklenberg Board of Education, 312 F. Supp. 503 (D.C. N.C. 1970), involving the North Carolina anti-bussing statute, §115-176.1.

Respondents do not believe that the day has come in these United States when this Court will hold that the Constitution and laws mean one thing in Georgia and something else in Illinois or Indiana.

As stated by Judge West in Davis v. East Baton Rouge Parish School Board, 269 F. Supp. 60 (D.C. La. 1967);

> "There can, of course, be no such thing as true constitutional government in the United States if the Court is legally permitted, as that Court (the Fifth Circuit) has done, to declare that the constitution means one thing in seventeen states and something else in the remaining thirty-three states."

And, as held by Judge Hoffman in Beckett v. School Board of Norfolk, 308 F. Supp. 1274, 1304-5 (D.C. Va. 1969):

> "Assuming arguendo that de jure segregation is the result of either discriminatory public laws or actions by public officials, we have great difficulty in determining how any segregation can actually be de facto. Research discloses that practically every state, outside the so-called "Deep South," at some point in history had either (1) mandatory segregation of public schools, (2) permissive segregation, (3) anti-Negro voting laws, (4) miscegenation statutes, or (5) local practices, as revealed by judicial decisions or articles, regardless of state laws. Whether such state action required or merely permitted school segregation should be irrelevant if the result was segregation of the races. Even where such statutes were repealed prior to 1954, the pattern of segregation may have been so well established that its continued existence could only be de jure."
>
> * * * * *
>
> "We cannot believe that the Constitution may be interpreted one way for a group of states, and still another way for the remaining states."

In Monroe v. Board of Commissioners of Jackson, 380 F2d 955, 958 (C.A. 6th 1967), rev'd. on other grounds, 391 U.S. 450 (1958), the Court declared:

> "However ugly and evil the biracial school systems appear in contemporary thinking, they were, as Jefferson supra, concludes, de jure and were once found lawful in Plessy v. Ferguson. . . and such was

the law for 58 years thereafter. To apply a disparate rule because these early systems are now forbidden by Brown would be in the nature of imposing a judicial bill of attainder."

As pointed out in Part I (d), supra, it is not realistic to assume that racial imbalance is anymore injurious in Georgia than it is in any so-called de facto state. The minority pupil hardly can be expected to appreciate this nice distinction. And, as we also observed, as did Judge Hoffman in the Norfolk case, acts of de jure segregation can be found in all states, particularly under the rationale of Gaston County v. United States, 395 U.S. 285 (1969), holding that 61 year old acts of discrimination would continue to have effect today.

More to the point, however, the legislative history of the 1964 Act demonstrates that no such distinction was intended.

In a colloquy between Senators Saltonstall and Smathers, the former referred to the fact that as worded, the Act would not upset a Massachusetts court decision holding that assignments to overcome imbalance were not required, after which the following transpired:

"MR. SMATHERS. Would the Senator be willing to grant the same right to the people in the South that has been granted to the people in Massachusetts?

"MR. SALTONSTALL. As I understand, this provision would certainly apply to all parts of the country. That

is the reason I agreed to the language in the substitute bill."

Also, on that page, Senator Saltonstall said:

> "As I see it, it refers to the local administration, wherever that local administration may be. It is not an effort to do something for the North as against the South. I am certainly opposed to anything in the bill that is of a regional character.
>
> "The substitute bill provides that the local authorities, within their responsibilities, shall operate the school system, and are not required to achieve a racial balance or correct a racial imbalance through moving children by bus into a community where they ordinarily would not go to school." (Congressional Record, U. S. Senate 1964, p. 13821 (June 4).

Also, in the Senate, Senator Humphrey referred to the fact that the provision was based upon the decision in Bell v. School City of Gary, Indiana, 213 F. Supp. 819 (D.C. Ind. 1963), aff'd. 324 F2d 209 (C.A. 7th 1963), cert. den. 377 U.S. 924 (1964), and while the Court of Appeals for the Fifth Circuit erroneously concluded from this reference that the act was directed only at de facto states, United States v. Jefferson County Board of Education, supra, 372 F2d at 862, it is clear that Indiana was a de jure state, for as noted by the Court:

> "Prior to 1949, Gary had segregated schools in what is commonly known as the Pulaski Complex. Two schools were built on the same

> campus, one was called Pulaski-East and the other Pulaski-West. One was occupied by Negro students and the other by white students. This was in accordance with the separate but equal policy, then permitted by Indiana law, (Burns Indiana Statutes Annotated, 1948 Replacement, Section 28-5104). In 1949, Indiana repealed the separate but equal law and passed a new act expressly prohibiting segregated schools on the basis of race, color or creed, (Burns Indiana Statutes Annotated, 1948 Replacement, Pocket Supplement, 28-5158)." (213 F. Supp. at 822).

Similarly, in Deal v. Cincinnati Board of Education, 419 F2d 1387, 1391 (C.A. 6th 1969), after reiterating its prior holding that the Constitution does not require the bussing of pupils to relieve against imbalance, the Court referred to findings of the trial court to the effect that the state (Ohio) had maintained segregated schools for Negroes on a voluntary basis until 1955 - one year after Brown. This clearly is no different than any southern state whose laws required segregation, for this Ohio arrangement is tantamount to the "three school" plans struck down by the courts. Boson v. Rippy, 285 F2d 43, 46 (C.A. 5th 1960); Houston School District v. Ross, 282 F2d 95 (C.A. 5th 1970); Kelley v. Nashville, 159 F. Supp. 272 (D.C. Tenn. 1958), aff'd. 270 F2d 209 (C.A. 6th 1959), cert. den. 361 U.S. 924 (1959). This is certainly such a significant involvement by the state in the promotion of segregation as to supply the element of state action. Reitman v. Mulkey, 387 U.S. 369 (1967); Anderson v. Martin, 375 U.S. 399 (1964).

If the anti-bussing statutes are valid, they should be enforced equally throughout the United States or not at all, and not selectively applied under disingenuous de facto- de jure distinctions.

(3) Aside From Other Considerations, The Plan Imposes Unequal Burdens Upon The Negro Respondents.

Petitioners' plan is based upon geographic zoning under which pupils attend the schools located in their respective zones near to their homes. However, in order to obtain the necessary quantity of Negro children from the inner city to desegregate the outlying schools, the officials arbitrarily selected five "pockets" of Negro pupils to be bussed out of their attendance areas to schools located in the suburban areas (A. 83, 114). All of the Negro children in the pockets are bussed except those in the West Broad district, who are required to walk to the Barrow School located outside their zone (A. 48, 116, 136, 154). Petitioners admit that in this respect, the Negro children are treated differently (A. 102).

This obviously places a burden of desegregation upon these Negro children which is not imposed against any white and some Negro, children. It therefore is unconstitutional. See Felder v. Harnett County Board of Education, 409 F2d 1070, 1074 (C.A. 4th 1969), disapproving a plan which placed unequal burdens upon the Negro students by closing

only the schools located in Negro neighborhoods. However, see to the contrary, Norwalk CORE v. Norwalk Board of Education, 298 F. Supp. 203 (D.C. Conn. 1968), upholding such a plan on the reasoning that while people are created equal, neighborhoods are not. However, "To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race." United States v. Jefferson County Board of Education, supra (372 F2d at 876).

Here, the plan imposes a burden upon the Negro respondents which is not imposed on others, and the basis is their race. This is a "discrimination based on race." The fact that it is rescrted to in order to bring about racial balance to satisfy HEW does not render it valid any more than the white respondents can be subjected to the burden of being assigned to schools because of their race. The seventeen states whose segregation laws were struck down in Brown obviously considered that the racial classification and assignment made thereby were to better the public good, but this court rejected the contention. The Court should not now resurrect racial discrimination under the guise of promoting a judicially-approved end whose merits are equally debatable.

(4) The Desegregation Plan Adopted By The Board And Rejected By HEW Was Valid; Therefore, The Court's Decision Setting Aside the HEW - Compelled Plan Is Correct And Should Be Affirmed.

The desegregation plan set aside by the Supreme Court of Georgia below was adopted by petitioners in response to requirements of HEW in pending compliance proceedings under Title 6 of the Civil Rights Act of 1964. Previously, the Board had adopted a more conventional neighborhood zoning plan in April, 1969 (A. 163) but this was rejected by HEW as being inadequate on June 30 (A. 164, 223). Thereafter, and because of the HEW rejection, the plan now in dispute was adopted on July 30 (A. 203).

The details of the April plan disapproved by HEW are set forth in the record (A. 167).

It is the position of respondents that (1) The April plan was valid (2) HEW erred in rejecting it and requiring petitioners to adopt the plan in dispute, and (3) That consequently, the decision of the Supreme Court of Georgia, constituting in effect, judicial review of administrative action of petitioners and HEW, was correct as a matter of law in the result it reached regardless of its reasoning.

Referring to the rejected plan (A. 167), it is seen that no all-Negro nor all-white schools would have existed thereunder. In only 2 of the 13 elementary schools would the Negro exceed the white enrollment (West Broad and East Athens). This plan would place 100% of the elementary pupils in the system in desegregated schools. Only one majority-black school (East Athens) has more than 65% Negro students. Only 42% of the Negro elementary pupils would be in majority-Negro schools, which is less than all but one of the major Northern cities referred to in the brief of the State of Georgia (p. 9), and the latter are system-wide percentages, compared against Clarke County's elementary percentages (Elementary percentages generally show greater racial isolation because of the more pronounced effect of a neighborhood plan on residential patterns).

Aside from whether the Constitution requires assignment of pupils by race to overcome racial imbalance, respondents submit that it most certainly does not require a quota system. Wright v. Rockefeller, 211 F. Supp. 460, 468 (D.C. N.Y. 1963), aff'd. 376 U.S. 52 (1964); Progress Development Corp. v. Mitchell, 182 F. Supp. 681 (D.C. Ill. 1960), rev'd. in part, 286 F2d 227 (C.A. 7th 1961); Banks v. Housing Authority, 120 Cal. App. 2d 1, 260 P2d 668 (1953), cert. den. 347 U.S. 974 (1954); Taylor v. Leonard, 30 N.J. Super. 116, 103 A2d 632 (1954);

United States v. Jefferson County Board of Education, supra, 372 F2d at 847, f.n. 5; Stell v. Savannah-Chatham County Board of Education, 333 F2d 55, 59 (C.A. 5th 1964), cert. den. 379 U.S. 933 (1964); Colon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134, 139 (D.C. N.Y. 1968); Truax v. Raich, 239 U.S. 33, 42-3 (1915); Deal v. Cincinnati Board of Education, supra, 419 F2d at 1390-1; Kemp v. Beasley, 423 F2d 851, 857 (C.A. 8th 1970). "We are not yet prepared for the sacrifice of other values at the altar of uniform percentages." Kemp v. Beasley, supra (Judge Blackmun).

Consequently, since the decision of the Supreme Court of Georgia, in effect, reversing the action of HEW was correct, it is immaterial whether all that was said in the opinion may square with this Court's views or not, for "[I]t has been the uniform doctrine of this Court that, where it appears that the judgment of the state court must be affirmed on other grounds disclosed in the record, it will not be reversed for an erroneous ruling of the state court on a federal question not necessary to the decision of the cause." Crescent City Livestock Company v. Butchers' Union Company, 120 U.S. 141, 156 (1887).

CONCLUSION

The great tragedy of Brown is not the decision itself - de jure racial discrimination was destined to extinction sooner or later anyway -

but the unrealistic expectations of those who rejoiced at its demise. It was erroneously assumed that the invalidation of artificial barriers of the law would immediately usher in a new era of idyllic peace, prosperity and tolerance in which all the problems of poverty, deprivation and misunderstanding would quickly evaporate. Now that those expectations have not received fulfillment, the fallacious idea is urged that what the country needs is not merely governmental neutrality but compulsory association. Many well-meaning people apparently believe that this is the only solution for all the ills that beset our beleaguered republic. But the assumption has proven false. Mr. Joseph Alsop had occasion to observe earlier this year that "The attempt to integrate this country's schools is a tragic failure", Newsweek, February 23, 1970, p. 108, and this same idea permeates the Chief Justice's dissent in the Washington, D. C. school case while he was a member of the Court of Appeals. Smuck v. Hobson, 408 F2d at 196.

Whether desegregation thus far has been a failure or not, we can not express too strongly our feelings that compulsory integration will not only fail, but destroy public education and irretrievably divide the country as well.

Compelling people to associate against their will does not lessen, but only exacerbates, racial tensions. There were no riots,

Supreme Court, U.S.
FILED
OCT 20 1970
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 420

CHARLES McDANIEL, et al.,

Petitioners,

VS:

JOSEPH BARRESI, JR., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

MOTION FOR LEAVE TO FILE REPLY BRIEF AND TO DISPENSE WITH PRINTING

Respondents move for leave, pursuant to Rule 41(3), to file reply brief, on the ground that certain questions were asked counsel for respondents during oral argument which were not answered due to lack of time. Respondents move for an order dispensing with the printing of this reply brief on the same grounds previously stated in connection with respondents' motion to dispense with printing of the original brief.

previously granted by this Court. The reply brief of respondents for which leave is sought is attached hereto.

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REPLY BRIEF ON BEHALF OF RESPONDENTS

During oral argument, counsel for respondents advised the Court, particularly Mr. Justice White, that some remarks would be addressed to the question as to whether a state might, independent of any federal compulsion as involved in this case, undertake to alleviate racial imbalance in the public schools, and as a means thereof, assign both white and Negro children to school on the basis of race. However, due to the fact that so much of counsel's time was involved with answering other questions, he was unable to direct any remarks to these questions. This brief will deal with this question.

(1) Alleviation of Racial Imbalance

Some lower-court cases holding that school boards may validly assign pupils so as to achieve racial balance are cited at page 37 of respondents' original brief, in footnote 11.

It is respondents' position that these cases are not correct, and that the racial assignment of children to schools to achieve either segregation or racial balance is no longer permissible after Brown. We point out again, however, that the question is not presented in this case, for here the Clarke County Board of Education acted pursuant to compulsion of HEW (A. 97) in pending Title 6 enforcement proceedings (A. 165) following rejection by HEW on June 30 (A. 223) of a pure neighborhood plan (A. 167) which eliminated all all-black schools, and which respondents contend was clearly a valid and sufficient plan.

With respect to respondents' contention that voluntary assignment of pupils to achieve racial balance is now unconstitutional, we concede that this Court has not yet specifically declared that racial classifications are per se invalid. Indeed, in Hirabayashi v. United States, 320 U.S. 81 (1943) and Korematsu v. United States, 323 U.S. 214 (1944), this Court upheld racial classifications, but in the Hirabayashi case, the Court's opinion made it clear that the classification would not have been upheld except in the context of an exercise of Congress' war power during a time of declared war. 320 U.S. at 100.

This Court's decision in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) also did not state specifically that racial classifications per se are invalid, and while some language was utilized which is subject to the possible construction that the classifications were there condemned because of a particularized evidentiary finding (347 U.S. at 494), the cases which immediately followed, striking down segregation in such unrelated, non psychologically-oriented facilities as parks and golf courses, admit of no such construction, but tend instead to support the view that racial classifications are per se invalid. This is the view of the Court of Appeals for the Fifth Circuit. United States v. Jefferson County Board of Education, 372 F2d 836 at 876.

Racial classifications were also considered in McLaughlin v. Florida, 379 U.S. 184 (1964) and Loving v. Virginia, 388 U.S. 1 (1967). In the former case, two justices stated their individual opinions to be that racial classifications were per se invalid if found in criminal statutes, and in the Loving case, the Court's opinion, in striking down the Virginia miscegenation statute, used language expressing doubt that any racial classification would be valid (388 U.S. at 11). See also Muir v. Louisville Park Theatrical Association, 347 U.S. 971 (1954); Dawson v. M &c. of Baltimore, 350 U.S. 877 (1955); Gayle v. Browder, 352 U.S. 903 (1956); Holmes v. Atlanta, 350 U.S. 879 (1955); Virginia

Board of Elections v. Hamm, 379 U.S. 19 (1964); Anderson v. Martin, 375 U.S. 399 (1964); Watson v. Memphis, 373 U.S. 529 (1963); Lee v. Washington, 390 U.S. 333 (1968). Johnson v. Virginia, 373 U.S. 61 (1963).

Respondents submit that a holding by this Court now that some racial classifications are permissible would entail grave consequences. This would necessarily arise from a holding that school boards could assign pupils on a racial basis to accomplish racial balance. In this respect, we have previously pointed out in our brief that the underlying sociological premise supporting such state action in the lower court cases upholding it is the doctrine that the conceded disparity of achievement by minority pupils[1] is attributable to the lack of cultural advantages in the home and neighborhood environment. Therefore, the argument goes, the minority child can be improved and accorded "equal educational opportunity," 55 Cornell LR 594 (1970), only by removing him to the better environment of white schools, thereby enabling him to associate with white children who have had all the advantages of a culturally enriched home.[2] Hobson v.

1. See Coleman Report; p. 20.

2. It is interesting to observe that this sociological doctrine, which is seriously being urged by many otherwise responsible people, comes very close to the notion of Plato that all wives and children should be held in common, characterized by this Court in Meyer v. Nebraska, 262 U.S. 390, 401-2 (1923) as the inevitable consequence of acceptance of the doctrine that the state is empowered to standardize all children.

Hansen, 269 F. Supp. 401 (D.C. D.C. 1967), vacated, 408 F2d 175 (1969); Branch v. Board of Education, 204 F. Supp. 150 (D.C. N.Y. 1962); Barksdale v. Springfield School Committee, 237 F. Supp. 543 (D.C. Mass. 1965), disapproved, 348 F2d 261 (C.A. 1st 1965); Spangler v. Pasadena Board of Education, 311 F. Supp. 501 (D.C. Cal. 1970); Jackson v. Pasadena School District, 59 Cal. 2d 876, 382 P2d 878 (1963); Blocker v. Board of Education of Manhasset, 226 F. Supp. 208 (D.C. N.Y. 1964); Davis v. School District of Pontiac, 309 F. Supp. 734 (D.C. Mich. 1970); United States v. School District 151, 301 F. Supp. 201, 205 (D.C. Ill. 1969); Keyes v. School District No. 1 of Denver, 313 F. Supp. 90, 96-7 (D.C. Colo. 1970); Swann v. Charlotte-Mecklenburg Board of Education, 300 F. Supp. 1358 (D.C. N.C. 1968); S.C., 306 F. Supp. 1291 (1969); S.C., 306 F. Supp. 1299 (1968

If such a doctrine is now seriously urged, which by no means is a settled one, see 5 Harv. Civil Liberties L.R. 488, 494 (1970), 43 So. Calif. L.R. 275 (1970), it would be an open invitation for some litigant to attack the underlying premise - that disparate Negro achievement is attributable to environmental factors - by attempting to establish judicially that these disparities are in fact attributable to genetic factors. This has already been attempted in several cases. See Stell v. Savannah-Chatham County Board of Education, 220 F. Supp.

667 (D.C. Ga. 1963), rev'd. 333 F2d 55 (C.A. 5th 1955); Jackson Municipal Separate School District v. Evers, 357 F2d 653 (C.A. 5th 1966).

In other words, any effort by this Court to draw a line between racial classifications deemed benign and those deemed hostile, and thereby to uphold the one and invalidate the other, might well require that the Court adjudicate the age-old controversy of racial supremacy - a "sticky-mess"-which no court should attempt ever to do, and which recalls to mind the undesirable consequences which ensued the last time this Court undertook such a task in Dred Scott v. Sanford, 19 How. 393, 15 L.Ed. 691, 701 (1857).

A holding that racial classifications are per se unconstitutional avoids the necessity for a court having to decide such delicate issues as this - issues which courts are not equipped to decide. See, Viera, "Racial Imbalance, Black Separatism and Permissible Classification by Race," 67 Mich. L.R. 1553, 1611-12 (1969).

If racial classifications are per se invalid as contended for here, it would follow that Congress could not legislate otherwise under the enforcement clause (§5) any more than Congress could pass an Act reversing Brown. See Katzenbach v. Morgan, 384 U.S. 641, 651, fn. 10; United States v. Harris, 106 U.S. 629 (1883). Of course, even

assuming that racial classifications are not per se invalid, it does not follow that what a state or Congress might do is also the measure of the obligation of a state under the Fourteenth Amendment when the state or Congress has not seen fit to act. Katzenbach v. Morgan, supra (384 U.S. at 648-9).

We repeat: The paramount issue in all these cases now before the Court is not bussing, but whether the Constitution requires integration or merely prohibits state-enforced segregation. A resolution of this issue would therefore be determinative of all the media concludendi, such as bussing, racial balance, ratios, quotas, and the legality of the all-black school. Notwithstanding the professed reliance by the plaintiffs in the Mobile and Charlotte cases upon the de jure doctrine and the propriety of remedial devices for formerly de jure systems, we submit that a close examination reveals that in fact the Court is being urged to formulate constitutional doctrine based upon concepts of educational opportunity which the Court in a subsequent case will be asked to extend to all school systems, formerly de jure or otherwise.

(2) Congressional Legislation on The Subject

In addition to those federal statutes prohibiting racial balance which are cited in respondents' original brief, see also 20 USCA

884. The "anti bussing" philosophy was also written into the Model Cities Act by Congress. See 42 USCA, Sections 3303 (d) and 3335(f).

(3) The De Facto - De Jure Distinction

This doctrine is to the effect that while race ordinarily can not be used as the basis of assigning pupils to school, it must be used in a formerly de jure system so as to overcome the effects of past discrimination. This doctrine thus is relied upon (1) As a means of excepting all formerly de jure systems from the "anti bussing" prohibitions of federal law, 42 USCA, Sections 2000c, 2000c-6; 20 USCA, Sections 242, 884, and (2) As a basis for requiring, as remedial provisions, the affirmative assignment of pupils to schools on the basis of race, including the requirement that stated percentages or quotas be achieved.

This distinction is not a valid one for the following reasons:

(1) Why should 1954 be the determinative date? As this Court observed in Brown, "[E]lsewhere in the North segregation in public education has persisted in some communities until recent years." 347 U.S. at 491, f.n. 6. It existed in Indiana until 1949, Bell v. School City of Gary, 213 F. Supp. 819, 822 (1963) and in Cincinnati until 1955. Deal v. Cincinnati Board of Education, 419 F2d 1387, 1391

(C.A. 6th 1969). See also 23 Ga. B.J. at p. 24 et seq., where the status of school segregation in all states both before and after the Fourteenth Amendment is reviewed.

(2) Congress has spoken against such disparate treatment in the Green Amendment, 20 USCA 888.

(3) Even in states previously having no state-enforced segregation, some evidences of discrimination can almost always be found in related areas, such as state court enforcement of restrictive covenants, zoning, and private residential development. See Fiss, "Racial Imbalance in the Public Schools: The Constitutional Concepts", 78 Harv. L.R. 564 (1965); Wright, "Public School Desegregation: Legal Remedies For De Facto Segregation," 40 N.Y. U.L.R. 285 (1965); and other articles cited in 11 ALR 3d 783. Studies have also been published lately showing that federal agencies followed policies of segregation in public housing and urban renewal programs until only a few years ago. Under Gaston County v. United States, 395 U.S. 285 (1969), this Court held that discrimination is presumed to have some effect 60 years after the fact.

(4) From the standpoint of the minority pupil, racial isolation is no different whether occurring in Georgia or New York. To the child, then, the distinction is irrelevant.

(5) Whatever the efficacy of the distinction as far as conferring power against the school board, it can not justify depriving the objecting white and black children of the same rights of non-discrimination which the racial assignment seeks to confer upon consenting children. "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals". Shelley v. Kramer, 334 U.S. 1, 22 (1948).

We do not offer these observations as a basis for holding that compulsory racial assignments should be required in all 50 states, but rather to show (1) That they should not be required anywhere; otherwise, the effect is to impose sanctions on a retroactive basis for conditions which were legal when brought into existence, compare Monroe v. Board of Commissioners of Jackson, 380 F2d 955, 958 (C.A. 6th 1967), and (2) That if such retroactive treatment is to be imposed, it should be a rule for all 50 states and not just 17.

(4) The Supremacy Clause Argument.

Counsel for petitioners in the Charlotte case advanced the argument that the Supremacy Clause of the Constitution justifies racial assignments to overcome the effects of discrimination.

This argument is not valid for these reasons:

(1) It erroneously assumes that the rights of one group who object can be violated in order to accord benefits to another group which consents.

(2) It erroneously assumes that racial assignments and racial balance are the only ways of overcoming the effects of past discrimination. This is not so. Congress has not so determined, and in every instance when it has spoken on the subject, has decided to the contrary.

CONCLUSION

Compulsory integration is wrong for the same reason that compulsory segregation was wrong. They both constitute a dehumanizing impingement upon freedom in an area where government has no right to encroach.

Brown was rightfully heralded as ushering in a new dimension of liberty. It is today sought to be distorted into an instrument of oppression no less pernicious than that which it abolished.

We respectfully submit that this cannot come to pass as long as this court sits.

Aside from this, whatever rule this court finally announces, we ask that it apply alike to all 50 states, for as stated by a district court in

Louisiana, there can be no such thing as true constitutional government in these United States if the constitution is held to mean one thing in 17 states and something else in 33 other states.

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CERTIFICATE OF SERVICE

I hereby certify that I have, prior to filing, served copy of the foregoing Motion and Reply Brief upon Mr. Eugene Epting, Erwin, Epting Gibson & Chilivis, P. O. Box 1587, Athens, Georgia 30601, Attorneys for Petitioners, by mail, duly addressed and postage prepaid.

This 16th day of October, 1970.

E. Freeman Leverett

Attorney for Respondents

Syllabus

McDANIEL, SUPERINTENDENT OF SCHOOLS, ET AL. *v.* BARRESI ET AL.

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 420. Argued October 13, 1970—Decided April 20, 1971

The Board of Education of Clarke County, Ga. (with a two-to-one white-Negro elementary school system ratio), devised a student assignment plan for desegregating elementary schools which establishes geographic zones drawn to promote desegregation and also provides that pupils in heavily concentrated Negro "pockets" walk or go by bus to schools in other attendance zones. The resulting Negro elementary enrollment ranges from 20% to 40% in all but two schools, where it is 50%. Respondent parents sued to enjoin the plan's operation. The state trial court denied an injunction. The Georgia Supreme Court reversed, holding that the plan violated (1) equal protection because it "[treated] students differently because of their race," and (2) the Civil Rights Act of 1964, because Title IV prohibits a school board from requiring busing to achieve a racial balance. *Held:*

1. In compliance with its duty to convert to a unitary system, the school board properly took race into account in fixing the attendance lines. P. 41.

2. Title IV, a direction to federal officials, does not restrict state officials in assigning students within their systems. Pp. 41–42.

226 Ga. 456, 175 S. E. 2d 649, reversed.

BURGER, C. J., delivered the opinion for a unanimous Court.

Eugene A. Epting argued the cause and filed a brief for petitioners.

E. Freeman Leverett argued the cause and filed a brief for respondents.

Briefs of *amici curiae* were filed by *Solicitor General Griswold* and *Assistant Attorney General Leonard* for the United States, and by *Arthur K. Bolton*, Attorney General, *Harold N. Hill, Jr.*, Executive Assistant Attorney General, and *Alfred L. Evans, Jr.*, and *J. Lee Perry*, Assistant Attorneys General, for the State of Georgia.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to review a state court order enjoining the operation of a school desegregation plan. The action was brought in the Superior Court of Clarke County, Georgia, by parents of children attending public elementary schools in that county. Named as defendants were the Superintendent of Education and members of the Clarke County Board of Education. The trial court denied respondents' request for an injunction, but on appeal the Supreme Court of Georgia reversed, 226 Ga. 456, 175 S. E. 2d 649 (1970). This Court then granted certiorari, 400 U. S. 804 (1970).

Beginning in 1963, the Clarke County Board of Education began a voluntary program to desegregate its public schools. The student-assignment plan presently at issue, involving only elementary schools, has been in effect since the start of the 1969 academic year. The plan, adopted by the Board of Education and approved by the Department of Health, Education, and Welfare,[1] relies primarily upon geographic attendance zones drawn to achieve greater racial balance. Additionally, the pupils in five heavily Negro "pockets" either walk or are transported by bus to schools located in other attendance zones.[2] As a consequence the Negro enrollment of each

[1] It may well be that the Board of Education adopted the present student-assignment plan because of urgings of federal officials and fear of losing federal financial assistance. The state trial court, however, made no findings on these matters. No federal officials are parties in this case.

[2] Where the distance between the student's residence and his assigned school is more than 1½ miles, free transportation is provided. There is no challenge here to the feasibility of the transportation provisions of the plan. The annual transportation expenses of the present plan are reported in the record to be $11,070 less than the school system spent on transportation during the 1968–1969 school year under dual operation.

elementary school in the system varies generally between 20% and 40%, although two schools have a 50% Negro enrollment. The white-Negro ratio of elementary pupils in the system is approximately two to one.

Respondents contend in this action that the board's desegregation plan violates the Fourteenth Amendment of the Federal Constitution and Title IV of the Civil Rights Act of 1964. The Supreme Court of Georgia upheld both contentions, concluding first that the plan violated the Equal Protection Clause "by treating students differently because of their race." The court concluded also that Title IV prohibited the board from "requiring the transportation of pupils or students from one school to another . . . in order to achieve such racial balance . . . ." We reject these contentions.

The Clarke County Board of Education, as part of its affirmative duty to disestablish the dual school system, properly took into account the race of its elementary school children in drawing attendance lines. To have done otherwise would have severely hampered the board's ability to deal effectively with the task at hand. School boards that operated dual school systems are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green* v. *County School Board*, 391 U. S. 430, 437–438 (1968). In this remedial process, steps will almost invariably require that students be assigned "differently because of their race." See *Swann* v. *Charlotte-Mecklenburg Board of Education, ante*, p. 1; *Youngblood* v. *Board of Public Instruction*, 430 F. 2d 625, 630 (CA5 1970). Any other approach would freeze the status quo that is the very target of all desegregation processes.

Nor is the board's plan barred by Title IV of the Civil Rights Act of 1964. The sections relied upon by respondents (42 U. S. C. §§ 2000c (b), 2000c–6) are di-

rected only at federal officials and are designed simply to foreclose any interpretation of the Act as expanding the powers of federal officials to enforce the Equal Protection Clause. *Swann, supra,* at 17. Title IV clearly does not restrict state school authorities in the exercise of their discretionary powers to assign students within their school systems.

Reversed.